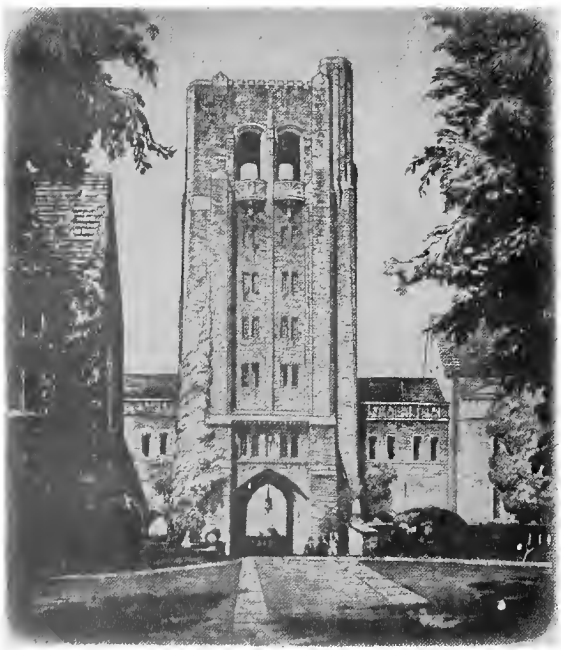

AN EPITOME

OF

LEADING COMMON LAW CASES;

WITH SOME SHORT NOTES THEREON:

CHIEFLY INTENDED AS

A Guide to "Smith's Leading Cases,"

FIFTH EDITION.

BY

JOHN INDERMAUR,

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AUTHOR OF "PRINCIPLES OF THE COMMON LAW," "MANUAL OF PRACTICE," "AN EPITOME OF LEADING CONVEYANCING AND EQUITY CASES," ETC., ETC.

AMERICAN EDITION

BY

CHARLES A. BUCKNAM AND BORDMAN HALL,

Of the Boston Bar.

BOSTON:

THE BOSTON BOOK COMPANY.

1889.

PREFACE TO THE AMERICAN EDITION.

THE favor with which Mr. Indermaur's Epitome is received in England has induced the Editors of this edition to undertake to adapt the work to the needs of the American student. In so doing they have sought to briefly illustrate the rules laid down, citing American authorities, and; in a few instances, have extended the notes by stating additional matter and citations.

As in the English edition, "for the particular use of students, blank spaces are left for the purpose of making manuscript notes and additions."

BOSTON, January, 1883.

PREFACE.

THE Compiler of this small volume while reading for his Final Examination, devoted some time to the study of Leading Cases, and it long ago occurred to him that — many articled clerks not having sufficient time to fully peruse the large volumes of "Leading Cases" — a short Epitome, giving those decisions most important to be read and remembered, would be very useful to them. Besides this, he has long thought that an Epitome might be equally, if not more useful, to those who attentively read the large volumes, for they can, after having done so, speedily run through a small manual like the present and impress the chief decisions on their memories. This Epitome professes to nothing particularly original, for it is indeed but an abridgment of the chief decisions in "Smith's Leading Cases," with some few additional ones, and some short notes bearing directly on the different decisions. The facts of the different cases are given when they could be shortly stated, and when they

seemed to be of a character likely to serve to impress the decision on the student's memory.

It is sincerely hoped that this Epitome will be found useful for the purpose for which it is intended, viz., as a help to the reading of "Smith's Leading Cases."

J. I.

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Note.— The Edition of "Smith's Leading Cases" to which reference is made in this Epitome is the 7th American published in 1872

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AN EPITOME

OF

LEADING COMMON LAW CASES,

INTENDED AS

A Guide to "Smith's Leading Cases."

TWYNNE'S CASE.

(S. L. C. Vol. I. p. 33.)
(3 Coke 80.)

Information against Twynne, for making and publishing a fraudulent gift of goods. Pierce was indebted to Twynne in £400, and to C in £200. Pending an action by C against Pierce, Pierce, being possessed of goods to the value of £300, by deed of gift conveyed them to Twynne in satisfaction of his debt, but Pierce continued in possession of the goods. C obtained judgment against Pierce, and issued a *fi. fa.*, and Twynne resisted execution.

Resolved: That the gift was fraudulent within 13 Eliz. c. 5, on the following grounds: —

1. The gift was perfectly general.
2. The donor continued in possession.
3. It was made in secret.
4. It was made pending the writ.

5. There was a trust between the parties, and fraud is always clothed with a trust.

6. The deed contained that the gift was honestly and truly made, which was an inconsistent clause.

Notes. — The rule under the statute of 13 Eliz. c. 5, is that all gifts and conveyances of either chattels or of land made for the purpose of defeating or delaying creditors are void against them unless made upon a valuable consideration and *bonâ fide* to some person without notice of the fraud; and it should be observed that this rule applies not only to creditors to whom the person is indebted at the time, but also immediately afterwards to such an extent that he has not sufficient exclusive of the property so disposed of to pay such debts. Of course, although a conveyance may be fraudulent under the statute, yet as between the parties themselves it may be good. The above case was not decided on the ground that there was *no* consideration, for the debt was a sufficient consideration, but on the ground that it was not *bonâ fide*. A debtor has a right to prefer one creditor to another; but he must do so openly, for the law will not allow a creditor to make use of his demand to shelter the debtor, and while he leaves him *in statu quo* by forbearing to enforce the assignment, to defeat the other creditors by insisting on it. It may be observed that the enactments contained in 13 Eliz. c. 5 are simply declaratory of the Common Law.

In questions as to voluntary conveyances, there are three statutes upon which the answer may depend, firstly, the above statute, by which the voluntary conveyance may be bad as being fraudulent; secondly, the 27 Eliz. c. 4, by which all voluntary conveyances of *land* are void against subsequent purchasers for value; and, thirdly, the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 91.

A very extreme instance of a settlement being held bad within 13 Eliz. c. 5, is to be found in the case of *Ex parte Stephens, re Pearson*, L. R. 3 Ch. Div. 807. In that case John Pearson (who was not then a trader) in the year 1858 made a voluntary settlement of £1,000 for himself for life or until bankruptcy, and after his decease, for his wife for her life, and then for the children of the marriage. Afterwards, viz., in 1875, he was adjudicated bankrupt. It was held, that, notwithstanding the lapse of so long a time, the settlement was void as being a fraud against creditors.

A disposition of a man's goods otherwise than by delivery is ordinarily termed a Bill of Sale, — an instrument which is now in various particulars governed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), [and in the United States by the statutes of the various States.] It has been held, that, if the formalities proscribed by the Act are not observed, the effect is not to render the instrument absolutely void, but only bad as against execution creditors and trustees in bankruptcy and liquidation proceedings, and under assignments for the benefit of creditors. (*Davis* v. *Goodman*, L. R. 5 C. P. Div. 128.)

Questions of whether a Bill of Sale is fraudulent and void most frequently arise in the bankruptcy of the giver.

[There is some confusion among the authorities in this country upon the question of fraudulent gifts and conveyances. But every transfer of property not made upon a valuable consideration is void as against existing creditors; and voluntary transfers of property to a wife or child, made with a view to entering into some hazardous business, or with a fraudulent intent as to subsequent creditors, is invalid as to them. But if the gift be a reasonable provision, and is only a portion of the donor's estate, it will be held valid. (*Sexton* v. *Wheaton*, 8 Wheat. 229; *Salmon* v. *Bennett*, 1 Conn. 525; *Marston* v. *Marston*, 54 Maine 476.)

An absolute Bill of Sale, unaccompanied by possession, is a fraud against creditors, and should be so declared. (*Hamilton* v. *Russell*, 1 Cranch 109.) But where the sale is conditional, continued possession is not fraudulent. (*Conard* v. *Atlantic Ins. Co.*, 1 Peters (U.S.) 389.)

If it appears from the evidence that there was a use reserved to the vendor, fraud is a legal inference. (*Coolidge* v. *Melvin*, 42 N.H. 510.) But the doctrine of Massachusetts, followed by most of the States, makes continued possession as evidence of fraud a question for the jury. (*Ingalls* v. *Herrick*, 108 Mass. 351); *Davis* v. *Turner*, 4 Grattan 422; *Tilson* v. *Terwilliger*, 56 N.Y. 273.) Kentucky, Illinois, Indiana and Alabama follow the doctrine of the Federal Court; and New York, Pennsylvania, Connecticut and Vermont make no distinction between absolute and conditional sales.]

DUMPOR'S CASE.

(S. L. C. Vol. I. p. 93.)
(4 Coke 119.)

Decided: That where there is a covenant not to alien without license, and that license is once given, the license applies to all future acts of a like nature, so that no alienation afterwards, though without license, is a breach of the covenant.

Notes. — The following was the practical working of the extraordinary doctrine laid down in this case: A makes a lease to B, who covenants not to assign without the license of A. A grants a license to B to assign to C, and afterwards, notwithstanding the covenant, the term can be assigned to any one. The ground of the doctrine was that every condition of re-entry is entire and indivisible, and the condition, having been waived once, could not be enforced again. Recent legislation has altered this doctrine, it being enacted by 22 & 23 Vict. c. 35, s. 1, that every such license shall, unless otherwise expressed, extend only to the permission actually given, or the actual matter thereby specifically authorized to be done, unless otherwise specified. The subject of an actual waiver of a covenant — e.g., where a landlord, knowing of a breach of covenant, received rent — may here be noticed, for which the above enactment did not provide. An *actual* waiver of a breach of a covenant destroyed the condition of re-entry; but 23 & 24 Vict. c. 38, s. 6, enacts that any actual waiver of a breach of covenant, taking place after the passing of that Act (July 23, 1860), shall *not* be deemed to extend to any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

[The right of re-entry for breach of condition is a chose in action

and is not assignable. (*Hooper* v. *Cummings*, 45 Maine 359.) A covenant *not* to do a certain act upon the premises conveyed, without a license from the grantor, is a condition imposed upon the covenantee for the benefit of the covenantor; and if the condition is susceptible of breach by a single act, and the grantor gives an express license permitting the act to be done, his right to re-enter for future acts done without a license is gone forever. (*Bleecker* v. *Smith*, 13 Wend. 530; *McKildoe* v. *Darracott*, 13 Grattan 278; *Merrifield* v. *Cobleigh*, 4 Cush. 178.)

But affirmative, continuing covenants may be impliedly waived by accepting rent, or the landlord doing some act recognizing the relation of lessor and lessee as still subsisting, or failure on the part of the grantor to take advantage of forfeiture for a long time. But rent must be accepted after forfeiture and have accrued as such, and the lessor must have had knowledge of the forfeiture to bar the right to re-enter. (*Jackson* v. *Allen*, 3 Cowen 220; *Hooper* v. *Cummings*, supra; *Stuyvesant* v. *Davis*, 9 Paige (N.Y. 427).]

SPENCER'S CASE.

(S. L. C. Vol. I. p. 137.)
(5 Coke 16.)

This was an action of covenant by the lessors of certain property against the assignees thereof, for not building a wall upon the property as the original lessee had covenanted to do. The principal discussion in the case was as to what covenants would run with the land; and the following were the chief points decided:—

1. That, where the covenant extends to a thing *in esse* parcel of the demise, the covenant is appurtenant to the thing demised, and binds the assignee without express words, as if the lessee covenants to repair the house demised to him, during the term; but *not* so, if the thing is not in being at the time of the demise.

2. That where the lessee covenants for himself "*and his assigns*," to do some act *upon the thing demised*, though not in existence at the time of the demise, there, forasmuch as it is to be done upon the land demised, that binds the assignee.

3. But even though the lessee covenant for himself "*and his assigns*," yet if the thing to be done be merely collateral to the land, and does not in any way touch or concern the thing demised, there the assignee cannot be charged.

Notes. — This case shows the nature of the covenants which will run with the land, by which is meant those covenants as to which either the liability to perform them, or the right to take advantage of them, passes to the assignee of the land. The better opinion is, that at common law covenants ran with the land, but not with the reversion, which rule proceeded upon the doctrine that though an estate could be assigned, a contract could not; so that, for instance, if a lessee covenanted to keep his house in repair, and the lessor then sold, he could not assign the benefit of the covenant, so that on breach of covenant by tenant the new landlord could not bring an action in his own name, but all he could do would be to obtain permission from the original lessor to bring it in his name. Of course, this is no longer so, for the statute of 32 Hen. 8, c. 34, whilst confirming the common law, that the benefit of covenants relating to the land entered into by the lessor will pass to the assignee, alters the common law by enabling the *assignee of the reversion* to take advantage of the covenants entered into by the lessee with the lessor from whom such assignee claims.

The reason of the passing of the statute of 32 Hen. 8, c. 34, was, that at the time of the Reformation, when a large part of the Church lands fell into lay hands, the inconvenience of the law attracted notice, for it pressed hardly on the grantees from the Crown of the lands of the dissolved monasteries, and whilst the enactment was specially created for their benefit, it was also made to apply to the whole public. (Elphinstone's "Conveyancing," pp. 228, 231.)

The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), with regard to leases made after Jan. 1, 1882, also contains provisions on this subject which are no doubt intended to enlarge the provisions of the above-mentioned old statute. The enactments referred to are as follows: "Rent reserved by a lease and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed and performed, and every condition of re-entry and other conditions therein contained, shall be annexed and incident to, and shall go with, the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, reclaimed, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased." (Sect. 10.) "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the

lease, shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to, and shall go with, that reversionary estate, or the several parts thereof, notwithstanding severance of the reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of, and enforced against any person so entitled." (Sect. 11.)

As to covenants running with the land in other cases than those between landlord and tenant. Those made *with* the owner of the land to which they relate may be taken advantage of by each successive transferee of the land to which they relate, provided he be in of the same estate as the original covenantee was; but as to those entered into *by* the owner of the land to which they relate, it seems they do not run with the land, but bind only the original covenantor, for if they bound transferees, they would frequently find themselves liable on contracts of which they were ignorant, and which would, if they had known of them, have deterred them from purchasing

[In this country covenants for title run with the land to heirs and assigns until breach; but those which stipulate for a particular state of things in the present are mere personal obligations.

Covenants for warranty, quiet enjoyment, to pay rent and taxes, and those beneficial to the land, attach themselves thereto, and run with it.

A covenant to insure the premises demised, the lessee to have the benefit of the insurance for the purpose of rebuilding, in case of fire, was held to run with the land, it being beneficial to both lessor and lessee. (*Masury* v. *Southworth*, 9 Ohio St. 340.) An agreement to assume a mortgage upon the premises conveyed cannot be set up as a bar to a recovery upon covenants of warranty and quiet enjoyment against an assignee of the covenantee. Nor is the assignee affected by notice of the existence of a mortgage at the time of conveyance to him. (*Suydam* v. *Jones*, 10 Wend. 180.) But covenants for seisin are broken, if at all, upon the execution of the deed containing them. They are merely personal obligations, and are not assignable. (*Swasey* v. *Brooks*, 30 Vt. 692.) A covenant, running with the land, made by a mortgagor in conveying his equity of redemption, attaches itself to such an estate, in those States where a mortgagee holds the legal title. (*White* v. *Austin*, 3 Met. 81).]

SEMAYNE'S CASE.

(S. L. C. Vol. I. p. 228.)
(5 Coke 91.)

The following were the most important points resolved in this case: —

1. It is *not* lawful for the sheriff, at the suit of a common person, to break the defendant's house to execute process, but, if a defendant flies to or removes his goods to another man's house, the privilege does not extend to protect him there, and, after denial on request made, the sheriff may break the house.

2. In all cases where the king is party the sheriff may break the defendant's house, after request to open the doors.

3. Where a house is recovered in a real action, the sheriff may break the house to deliver possession.

Notes. — It must be remembered, that, although the sheriff is justified in entering a third party's house to execute process of the law upon defendant or his property, yet if it happen that defendant be not there, or have no property there, the sheriff is a trespasser. When the sheriff has once obtained entry, he can break open the inner doors; and, where a defendant after arrest escapes, the sheriff may break his house, or the house of any person to which he escapes, to retake him.

[A demand and refusal must be made by an officer before he can lawfully break open the outer door of a building to levy attachment or make arrest.

Where an officer lawfully entered the house of the plaintiff and

arrested him, and the plaintiff broke away from the officer and thrust him out of doors, it was held that a demand by the officer for entry into the house, on his return to arrest the plaintiff, would have been a senseless ceremony, and that the officer was justified in breaking open the outer door. (*Allen* v. *Martin*, 10 Wend. 301.) A demand by an officer upon persons in charge of a warehouse, for admission to levy attachment on goods therein, was held to be sufficient to justify the officer in breaking the outer door of the warehouse. (*Burton* v. *Wilkeson*, 18 Vt. 186.) Where an officer had made a partial levy upon goods of the defendant within his house, and was resisted by the latter while trying to gain admission to the house for the purpose of completing the levy, he was held to he justified in bursting open the outer door for said purpose. (*Glover* v. *Whittenhall*, 6 Hill (N.Y.) 597).]

CALYE'S CASE.

(S. L. C. Vol. I. p. 241.)
(8 Coke 32.)

Resolved: That if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done, and the horse is stolen, the innkeeper shall not answer for it. To charge an innkeeper on the custom or common law of the realm for the loss of goods: (1) The inn ought to be a common inn. (2) The party ought to be a traveller or passenger. (3) The goods must be in the inn (and for this reason the innkeeper is not bound to answer for a horse put out to pasture). (4) There must be a default on the part of the innkeeper or his servants in the safe keeping of the guest's goods. (5) The loss must be to movables, and therefore if a guest be beaten at an inn, the innkeeper shall not answer for it.

Notes. — An inn is defined as "a house where the traveller is furnished with every thing he has occasion for on his way." An innkeeper is defined as "one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay therefor," and he is bound to receive a traveller into his house and provide properly for him upon his tendering a reasonable price for the same, unless, indeed, the traveller is drunk or suffers from a contagious disorder. If the innkeeper fails in his duty, he may be indicted at common law, or is liable

to an action. (*Fell* v. *Knight*, 10 L. J. (Ex) 277.) A person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper: and if a man come to an inn on a special contract to board and lodge there, the law does not consider him as a guest, but as a boarder. At common law an innkeeper was liable for all losses, unless they arose through the act of God, the king's enemies, or the fault of the guest or his servant; but now, by 26 & 27 Vict. c. 41, an innkeeper is not liable to make good any loss of, or injury to, goods (not being a horse or other live animal, or gear appertaining thereto, or any carriage), beyond £30, except (1) Where stolen, lost, or injured, through the wilful neglect or default of the innkeeper, or any servant in his employ; or (2) Where the goods are deposited expressly with him for safe custody; but to entitle the innkeeper to the benefit of the Act a printed copy of section 1 must be exhibited in a conspicuous part of the hall or entrance to the inn.

An innkeeper, if his bill is not paid, though he cannot detain his guest's person, has a lien on, and may detain, goods intrusted to his charge, though they are not the guest's property (*Threlfall* v. *Barwick*, L. R. 7 Q B. 711, but see, as explaining and limiting this, *Broadwood* v. *Granara*, L. R. 10 Ex. 417). And with regard to carriages, horses, &c., the innkeeper's lien is not limited to the charge for the care of the carriages and keep of the horses, but extends to the whole charges against the guest. (*Mullinger* v. *Florence*, 26 W. R. 385.) An innkeeper having a lien has now a power given him of actively enforcing it, it being provided by the Innkeepers Act, 1878 (41 & 42 Vict. c. 38), that if a person shall become indebted to him and shall deposit or leave any personal effects with him or in his inn or adjacent premises for the space of six weeks, the innkeeper, after having advertised a month previously in one London newspaper and one country newspaper circulating in the district, a notice describing the goods, and giving (if known) the name of the owner or person who deposited the goods, and of his intention to sell, may duly sell the same by public auction. Any surplus after paying the debts and expenses is to be handed to the person who left or deposited the goods.

[The relation of innkeeper and guest exists if one takes his meals at the inn, but does not reside there, even though he lives within the same town. (*Walling* v. *Potter*, 35 Conn. 183.) Goods within the out-buildings, and cattle within the yards belonging to the inn, which are the property of travellers stopping at the inn, are within the protection of the rule. (*Clute* v. *Wiggin*, 14 Johns. 175; *Hilton* v. *Adams*, 71 Maine 19.)

An innkeeper, as such, is not liable to one who *sends* his horses to the stable of the inn to be kept and fed, the owner taking and using them at his pleasure. (*Grinnell* v. *Cook*, 6 Hill 485) Nor is he liable to a guest for goods stolen from the latter from a sea-bathing house belonging to the former. (*Minor* v. *Staples*, 71 Me. 316.) He is not liable for injuries committed by his servants upon his guests, unless he co-operates with or consents to the acts.]

THE SIX CARPENTERS' CASE.

(S. L. C. Vol. I. p. 274.)
(8 Coke 146 *a*.)

Here six carpenters entered a tavern, and were served with wine, for which they paid: they were afterwards, at their request, served with bread and more wine, for which they then refused to pay. Trespass was on these facts brought against the six carpenters, and the only point in the case was, whether the non-payment made the entry into the tavern tortious. It was resolved: (1) That, if a man abuse an authority given by the law, he becomes a trespasser *ab initio;* but (2) Where the authority is given by the party and abused, there he is *not* a trespasser *ab initio,* but he must be punished for his abuse; (3) That non-feasance only, cannot make the party who has the license by law a trespasser *ab initio,* and therefore in this case the mere non-payment did *not* make the carpenters trespassers *ab initio.*

Notes. — The rule laid down in this case, that a man abusing an authority given him by the law becomes a trespasser *ab initio*, formerly applied to a distress; but now if any irregularity occurs in making a distress, if any rent is justly due, the distrainer is not a trespasser *ab initio.* (11 Geo. 2, c. 19, s. 10.) (See further, as to distress, *post*, pp. 40, 41.)

[An intention to do an unlawful act is mutable. And a plea of

justification to an action for assault and battery, that the plaintiff intended to commit an unlawful act, is bad. (*Gates* v. *Lounsbury*, 20 Johns. 427.)

If one is permitted to enter the house of another for the purpose of procuring evidence against the latter, although admission be gained by deception, yet he is not a trespasser *ab initio*. (*Allen* v. *Crofoot*, 5 Wend. 507.)

Where a constable entered the plaintiff's house by authority of law, and placed therein an intoxicated keeper in charge of the furniture, against the remonstrance of the plaintiff, he was held liable as a trespasser *ab initio*. (*Malcolm* v. *Spoor*, 12 Met. 279.)]

LAMPLEIGH v. BRAITHWAITE.

(S. L. C. Vol. I. p. 280.)
(Hobart 105.)

Decided: That a mere voluntary courtesy will not uphold *assumpsit*, for to do so it must be moved by a precedent request of the party who gives the promise, for then the promise though it follows, yet is not alone, but couples itself with the request. Labor, though unsuccessful, may form a valuable consideration.

Notes. — The rule requiring a valuable consideration to support a promise, is, of course, well known, and needs no comment in these notes; but it will be useful to observe here that such a consideration consists of either "some benefit to the party making the promise, or to a third person by the act of the promisee, or some loss, trouble, inconvenience to, or charge imposed upon, the party to whom the promise is made."

Considerations which, with reference to their nature, are divided into good and valuable, are also, with reference to time, denoted, executed, executory, contemporaneous, and continuing. An executed consideration will not support an action unless founded upon a previous request, expressed or implied, and this previous request will be implied in certain cases, of which the following are the chief: —

1. Where plaintiff has been compelled to do that which defendant ought to have done, and was compellable to do.

2. Where plaintiff has voluntarily done that which defendant was legally compellable to do, and, in consideration thereof, the latter has afterwards expressly promised to repay or to indemnify him.

3. Where defendant has taken the benefit of the consideration.

4. Where the plaintiff has voluntarily done some act for the defendant which is for the public good, e.g., in paying the expenses of burying a

person in the absence of the one legally liable to pay the same. (Indermaur's "Principles of the Common Law," Am. ed. pp. 17, 37, 38, 39.)

[In cases like the principal case there is no privity between the parties. A party conferring a benefit upon another either intends it as gratuitous, or confers it without the knowledge of the latter.

The defendant had a stack of wheat in the plaintiff's field, and was requested by the latter to remove it, as he wished to burn the wheat-stubble, to which the defendant assented, but failed to remove the wheat: whereupon the plaintiff removed it for safety, and brought an action to recover for the service, which was held to be gratuitous. (*Bartholomew* v. *Jackson*, 20 Johns. 28.)

But where one held property, as security, which had been increased in value by the services of another, he was allowed to recover the value of them from the former on an express promise made by him to the latter. The increased value of the security was a sufficient consideration, which coupled itself to the subsequent promise. (*Oakes* v. *Cushing*, 24 Maine 313.)

The defendant purchased lands which had been improved by the plaintiff, and promised to pay him for the improvements. It was held that there was no consideration for the promise. (*Carson* v. *Clark*, 1 Scam. (Ill.) 113.)]

CHANDELOR v. LOPUS.

(S. L. C. Vol. I. p. 299.)
(2 Coke 2.)

The defendant sold to the plaintiff a stone which he affirmed to be a Bezoar stone, but which proved not to be so. This action was brought upon the case; and, on error being brought, it was held that no action lay against defendant, unless he either knew that it was not a Bezoar stone, or warranted it to be a Bezoar stone.

PASLEY v. FREEMAN.

(S. L. C. Vol. II. p. 92.)
(3 T. R. 51.)

Decided: That a false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is ground for an action upon the case in the nature of deceit. In such an action, it is *not* necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is.

Notes on the two foregoing Cases. — These two cases are placed together as being slightly connected; but although this is so, the differences between them are obvious, for the case of *Chandelor* v. *Lopus* touches as well on the point of warranty, whilst *Pasley* v. *Freeman* only deals with the nature of the false affirmation that will support an action of deceit. A warranty may be defined as "an undertaking, express or implied, arising or given on the sale of goods or chattels." On the question of what amounts to a warranty, it may here be noticed that "every affirmation at the time of sale of personal chattels is a warranty, provided it appears to have been so intended." A warranty which is made subsequently to a sale is invalid for want of consideration, unless indeed, made upon some fresh consideration. As to the remedy of the vendee of a chattel on breach of warranty, he cannot return it and recover the price if it is some specific article sold, though he may if the warranty is in respect of manufactured goods never completely accepted, and provided he has only given the article a fair trial. So also a purchaser may return goods sold according to sample if they prove not to agree with the sample. In all cases the vendee can give the breach in evidence in reduction of the vendor's claim, or may bring an action against him for the breach.

The decision in the case of *Pasley* v. *Freeman* is subject to the enactment contained in 9 Geo. 4, c. 14, s. 6: "That no action shall be maintained whereby to charge any person upon, or by reason of, any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain 'credit, money, or goods upon,' unless such representation or assurance be made in writing signed by the party to be charged therewith."

An important distinction between a warranty and a false representation arises in an action brought in respect of either; in the case of the breach of warranty it is of no consequence that the defendant did not know of the defect against which he warranted; but if a person has not actually warranted and an action is brought on his false representation, his knowledge of its falsity must of course be shown.

Bearing in mind what is stated above, viz. . that every affirmation at the time of a sale of personal chattels is a warranty if it appears to have been so intended, it would appear that *Chandelor* v. *Lopus* can hardly be considered good law at the present day; for were the case now to arise, such a statement would, no doubt, be held to amount to a warranty. (See Indermaur's "Principles of the Common Law," Am. ed. 97.)

[See the statutes of frauds and perjuries of the different States.

A warranty is part of the contract or sale; but a representation is only inducement to it. (*Daily* v. *Green*, 3 Harris 118.) It is not necessary to prove the scienter in an action on a warranty. (*Bartholomew* v. *Bushnell*, 20 Conn. 271.) A false representation is the ground for an action on the case, when it is a statement of a *material fact* made by one who *knows it to be false* to another who does *not* know of its falsity and *believes* it to be true, with the *intention* that the latter should act upon it, and who, relying upon it, does so act. Knowledge of the falsity may be conclusively presumed where the representation is one peculiarly within the knowledge of the defendant.

In acting upon the representation the plaintiff must exercise the conduct of a prudent man. Where a false representation is made by an agent, which is unauthorized by the principal, or who has not received the benefit therefrom, it cannot be imputed to the latter in an action against him for the deceit of the agent. (*Bennett* v. *Judson*, 21 N.Y. 238. But see *Locke* v. *Stearns*, 1 Metc. 560.)]

COGGS v. BERNARD.

(S. L. C. VOL. I. p. 369.)
(LORD RAYMOND 909.)

HERE the defendant had promised the plaintiff to take up several hogsheads of brandy then in a certain cellar, and lay them down again in a certain other cellar, safely and securely; and by the default of the defendant one of the casks was staved and a quantity of brandy spilt. Verdict for plaintiff on a plea of not guilty, and on motion in arrest of judgment, *Decided:* That if a man undertake to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier, and was to have nothing for his pains. Lord Holt here classifies bailments as follows: (1) *Depositum*, or a naked bailment of goods to be kept for the use of the bailor. (2) *Commodatum*, where goods are lent to the bailee *gratis* to be used by him. (3) *Locatio rei*, where goods are lent to the bailee for hire. (4) *Vadium*, pawn. (5) *Locatio operis faciendi*, where goods are delivered to be carried, or something is to be done about them, for a reward to be paid to the bailee. (6) *Mandatum*, a delivery of goods to somebody who is to carry them, or do something about them gratis.

WILSON v. BRETT.

(11 M. & W. 113.)

Decided: That a party who rides a horse, at the request of the owner, for the purpose of exhibiting and offering him for sale without any benefit to himself, is bound to use such skill as he possesses; and if proved to be conversant with and skilled in horses, he is equally liable with a borrower for an injury done to the horse, for he is bound to use the skill which he possesses.

Notes on the two foregoing Cases. — These two cases are quoted together, the first as being the leading case on the subject, and showing the general principle that a gratuitous bailee is chargeable only when guilty of *gross* negligence, and the latter as somewhat altering that general principle by deciding that if the gratuitous bailee is in such a situation as to imply skill in what he undertakes to do, an omission to use that skill is imputable to him as gross negligence.

In considering the subject of bailments, we come to that of carriers. A common carrier has been defined as "a person who undertakes to transport from place to place for hire the goods of such persons as think fit to employ him." At the common law carriers were insurers liable for all losses, except those arising from the act of God, or of the King's enemies; and to obviate this liability it became their practice to put up in their warehouses notices limiting their liability, and provided it could be shown that a customer saw such notice, this was usually held to create a contract between the carrier and the customer. Statute 1 Wm. 4, c. 68, provided that carriers shall not be liable for certain valuable articles therein specified, such as gold, silver, pictures, etc., above £10, unless the nature and value of the article were declared, and an

increased rate of charge paid or agreed to be paid; and that the carrier may demand and receive an increased rate *to be duly notified in his warehouse.* No general notices or conditions are to limit the carrier's liability, but nothing in the Act contained is to prevent a special contract. This statute does not protect the carrier from any loss arising from the felonious act of any servant in his employ. After this Act railway companies frequently escaped its provisions by putting notices on the receipts given to persons sending goods, and this was held to constitute a special contract between the parties The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), therefore, provides that no such contract shall be of effect unless signed by the party delivering the goods to be carried; but the company may limit its liability by *reasonable* conditions, — the reasonableness of such conditions to be decided by the judge before whom the matter comes. This Act also exempts companies from liability for loss of (1) horses beyond the sum of £50, (2) neat-cattle £15, (3) sheep and pigs £2, per head, unless a higher value is declared, and an increased rate of charge is paid or agreed to be paid. It has been decided that this Act does not apply to contracts made by railway companies exempting themselves from liability by loss or detention beyond their own lines. (*Zunz* v. *South Eastern Ry. Co.*, L. R. 4 Q. B. 537.)

A common carrier is bound to carry all goods delivered to him for carriage provided the price be paid or tendered, that they are of the nature he ordinarily carries, that they are not dangerous, and that he has room in his vehicle. If a person delivers dangerous goods to a carrier without informing him of their dangerous nature, he will be liable for any accident arising from them to the carrier, or those who are concerned in the carriage. (*Farrant* v. *Barnes*, 11 C. B. (N.S.) 553.)

[A gratuitous passenger on board of a steamboat was injured by the explosion of its boiler, and was allowed to recover damages from the owner of the boat for the injuries sustained. (*Steamboat New World* v. *King*, 16 How., U.S. 469.)

In the case of *Carpenter* v. *Branch*, 13 Vermont, 161, the plaintiff and defendant agreed to exchange horses; but before doing so the defendant's horse was attached to the plaintiff's carriage, and the latter, at the request of the former, got into the carriage with him. The defendant drove the horse at an imprudent rate of speed while turning round and broke the wagon, and was obliged to pay for it.

A common carrier must not make unjust discrimination in the rates of compensation for carrying freight (*Chicago etc. R.R. Co.* v. *The Peo-*

ple, 67 Illinois 11), but may, for special reasons, stipulate with parties, in isolated cases, to carry freight for a certain time, and in certain quantities, for less compensation than is usual. (*Fitchburg R.R. Co.* v. *Gage*, 12 Gray 393.) A condition in a bill of lading, that the carrier should not be liable for damage to or deficiency in *packages* after they had been receipted for, was held not to apply to corn in *bulk*. (*McCoy* v. *Erie etc. R.R. Co.*, 42 Md. 498.) A common carrier is not liable for loss of live-stock carried over its railroad unless it is shown by the plaintiff that it agreed to assume the care and risk of the animals. (*Michigan etc. R.R. Co.* v. *McDonough*, 21 Mich. 166.) In the two latter cases, the one shows the need of distinct terms to limit the carrier's liability by special contract, and the latter indicates that the carrier of live-stock is not an insurer.]

ASHBY v. WHITE.

(S. L. C. Vol. I. p. 455.)
(Lord Raymond 938.)

At an election of burgesses for Parliament, the plaintiff, being entitled to vote, tendered his vote for two candidates; but such vote was refused, and notwithstanding those candidates for whom the plaintiff tendered his vote were elected, yet he brought this action against the constables of the borough for refusing to admit his vote. *Decided:* That action was maintainable; for it was an injury, though without any special damage.

Notes. — The above case decides, that although a person has suffered no actual or real damage, yet if he has suffered a legal wrong or injury, capable in legal contemplation of being estimated by a jury, an action lies; but the decision in this case must be carefully distinguished from those cases in which a damage is sustained by the plaintiff, but a damage not occasioned by any thing which the law considers an injury. In such cases the party damaged is said to suffer *damnum sine injuria*, and can maintain no action. See, in further exemplification of the above decision and these remarks, the important cases of *Fray* v. *Voules* (1 E. & E. 839), and *Marzetti* v. *Williams* (1 B. & Ad. 415), and Mayne's "Treatise on Damages" (2d ed., pp. 415, 416). (See also Indermaur's "Principles of the Common Law," Am. ed. pp. 4, 5.)

[There are two classes of cases where damages may arise, — one, like the principal case, where some legal right has been violated; the other, not wrongful *per se*, but where some injurious consequence follows from the act done.

Every trespass *quare clausum* is a wrong in itself and damages are legally implied from the unlawful entry into the close.

Where one polluted the water of a stream running through the land of another by putting poisonous substances into it, an injury was inferred from the violation of the legal right to have the water run in a pure state. (*Gladfelter* v. *Walker*, 40 Md. 1.) But an act may be lawful and only become a wrong as the result of negligence, or should it become a nuisance.

The law will not encourage the purchase of a right for the purpose of litigation. (*Occum Co.* v. *Sprague M'f'g Co.*, 34 Conn. 529.)]

BIRKMYR v. DARNELL.

(S. L. C. Vol. I. p. 490.)
(Salkeld 27.)

Decides: That a promise to answer for the debt, default, or miscarriage of another person, for which that other remains liable, is within the statute, but *not* if that other does not remain liable.

PETER v. COMPTON.

(S. L. C. Vol. I. p. 577.)
(Skinner 353.)

This was an action upon an agreement of the defendant, in consideration of one guinea paid him, to give the plaintiff so many on the day of his marriage. The marriage did not happen within a year, and the question was, whether or not the agreement must be in writing. *Decided:* That "an agreement which is not to be performed within one year from the making thereof" means, in the Statute of Frauds, an agreement which, from its terms, is incapable of being performed within the year; and therefore the agreement in this case need not be in writing.

Notes on these two Cases. — The following is the 4th section of the Statute of Frauds (29 Car. 2, c. 3): "No action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement which is not to be performed within one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The above two cases are therefore on two of the agreements mentioned in the section, viz. guarantees and agreements not to be performed within a year. The case of *Birkmyr* v. *Darnell* is on the point of guarantee, deciding that if the original party remains liable, then the agreement is within the statute, and must be in writing; but if the original party does not, in fact, remain liable, then it is entirely a fresh agreement, and not within the statute; and a guarantee is therefore properly defined as a collateral promise to answer for the debt, default, or miscarriage of another for which that other remains primarily liable. 19 & 20 Vict. c. 97, s. 3, provides that the consideration for a guarantee need not appear on the face of the written instrument (see *post*, p. 71); and the same statute (sect. 4) provides that a guarantee to or for a firm shall cease upon a change in the firm, unless the intention of the parties that it shall continue notwithstanding such change shall appear. The same statute also (sect. 5) provides that a surety who discharges the liability of his principal is to be entitled to an assignment of all securities held by creditor, although they may be deemed at law to be satisfied by his payment.

The latter case of *Peter* v. *Compton* well explains what is meant by an agreement not to be performed within one year from the making thereof, showing that where, on the face of the agreement, it is capable of being performed within the year, then it is not within the statute, and need not be in writing; though where, from its very terms, it is incapable of being so performed, then it must be in writing. However, with regard to this case, there is this to be observed, that it might have been decided in the same way upon another ground, viz., that all which was to be done by one of the parties was to be done within a year. (*Donellan* v. *Read*, 3 B. & Ald. 899.)

[The party to whom credit has been given is the one liable upon an undertaking. It was agreed between the parties to an executory agreement, that, if the one would *release* the other from his engagement, the latter would pay the outstanding indebtedness of the former, which had been incurred under the agreement; and it was held to be within the statutes of frauds. (*Curtis* v. *Brown*, 5 Cush. 488.) But in a similar contract, where the original debtor had absconded, and the contractor had refused to finish the work, but was induced to go on with it upon the representation of a third person that the latter had purchased the interest of the debtor in the contract, it was held that the latter agreement was an original one. (*King* v. *Despard*, 5 Wend. 277.)

If an agreement *might* be performed within a year, it is not within the statute of frauds. (*Kent* v. *Kent*, 18 Pick. 569.)]

PRICE v. EARL OF TORRINGTON.

(S. L. C. Vol. I. p. 535.)
(Salkeld 285.)

This was an action for beer sold and delivered, and the evidence given to charge defendant was, that the drayman, in the usual course of business, and in discharge of his duty, had made a note of the delivery of the beer, and set his hand thereto, and that he had since died. *Decided:* That this was good evidence of a delivery.

HIGHAM v. RIDGWAY.

(S. L. C. Vol. II. p. 331.)
(1 East 109.)

In this case it was necessary to prove the precise date of the birth of one William Fowden, and to prove this, an entry made by a man-midwife (since dead), who had delivered the mother, of his having done so on a certain day, referring to his ledger, in which he had made a charge for his attendance, *which was marked as paid,* was tendered. *Decided:* That this was good evidence.

Notes on these two Cases. — These two cases are here placed together because they are both on the subject of evidence, and because they are

sometimes confused by students. The grounds of the decisions are, however, quite distinct; that of *Price* v. *Earl of Torrington* being, that the entry was made in the ordinary course of business, and in the performance of duty: and here it must be observed, that in this class of cases only so much of the entry as it was strictly the duty of the party to make can be received. But the ground of the decision in *Higham* v. *Ridgway* was, that the entry was against the interest of the party who had made it, and in this class of cases the other facts stated in the entry, though not against the interest of the party making the entry, can be received. Had this not been so, the entry given in evidence in *Higham* v. *Ridgway* would have been inadmissible. The distinction is most important and should be well observed.

These two classes of cases come properly under the heading of Hearsay Evidence, which may be defined as some "oral or written statement of a person who is not produced in Court, conveyed to the Court either by a witness or by the instrumentality of a document." (Powell's "Evidence" 137.) The general rule as to hearsay evidence is that it is not admissible. The foregoing cases show two exceptions to this rule, and in addition to these, other cases in which the statements of persons not upon oath are admissible in evidence are, that in respect of matters of public and general interest, declarations of deceased persons who may be presumed to have had competent knowledge on the subject, are admitted if made before any controversy arose; also matters of pedigree may be proved by declarations of deceased persons connected by blood or marriage with the family, if made before any controversy arose, or by the general reputation of a family. (See hereon Indermaur's "Principles of the Common Law," Am. ed. pp. 442-445. Also see 32 & 33 Vict. c. 63, s. 4, *post*, p. 34.)

[In an action between two towns it became necessary to fix the true date of an event. The books of a deceased physician, containing the charges and the dates thereof, for services to one, the cause of the litigation, were admitted as competent evidence to prove such date, the employment and services of the physician having been proved. (*Augusta* v. *Windsor*, 19 Maine 317.)

The doctrine of *Price* v. *Torrington* is limited to the person whose duty it is to make the entry. It should not be extended so as to include an entry of sales made by one for another who cannot write, the latter having died. (Greenl. Ev. Vol. 1, s. 116, note 1.)]

CUMBER v. WANE.

(S. L. C. VOL. I. p. 595.)
(1 STRANGE 436.)

Decided: That giving a note for £5 cannot be pleaded in satisfaction of £15.

Notes. — This means that a smaller sum cannot be given in extinguishment of a greater, though something else might so operate; thus a horse might be given in discharge of a debt of £15, though it was not worth even £5. It should be here observed that in this case it does not appear that the note was a negotiable note, and it has since been decided that a *negotiable* security may operate, if so given and taken, in satisfaction of a debt of greater amount (*Sibree* v. *Tripp*, 15 M. & W. 23), the point being that where any thing not actually money, but of a different value, is given, the Court will not enter into the question of its adequacy. Again, if there is any doubt or any *bonâ fide* dispute as to the amount due, a smaller sum may be paid in satisfaction of a larger amount claimed. A smaller sum may also be made a satisfaction of a greater, if a receipt is given under seal; and under the Bankruptcy Act, 1869, a majority of the creditors of any person assembled as therein mentioned may by resolution agree to accept a composition in satisfaction of their debts, which is to be binding on the other creditors, and the payment of which composition is to discharge the debtor. (See Indermaur's "Principles of the Common Law," Am. ed. pp. 228, 229.)

[An agreement to take part payment of a debt in full accord and satisfaction of the same, to be valid, must be supported by some consideration not found in the original transaction.

It should be either imported by the use of a seal, or it should be such as would support a new, or any valid agreement.

A compromise of a doubtful claim, or acceptance of part payment from a third person in extinguishment of the debt made in behalf of the

debtor, or the acceptance of something not money, or receiving a part at a different time or place than agreed upon by the parties, would be a sufficient and binding consideration to bar an action brought to recover the balance of the original claim by a creditor against the debtor. (*Seymour* v. *Minturn*, 17 Johns. 169; *Brooks* v. *White*, 2 Metc. 283.)]

ARMORY v. DELAMIRIE.

(S. L. C. Vol. I. p. 636.)
(1 Strange 504.)

The plaintiff, being a chimney-sweeper's boy, found a jewel, and carried it to the shop of the defendant, who was a goldsmith, to know what it was. He delivered it to an apprentice, who took out the stone, and the master offered him three-halfpence for it. The plaintiff refused to take it, and insisted on having it returned, whereupon the apprentice delivered him back the socket without the stone; and so the plaintiff now brought an action of trover against the master. *Decided:* (1) The finder of a jewel may maintain trover for conversion thereof against the wrongdoer, for he has a good title against all but the right owner. (2) A master is liable for a loss of his customer's property intrusted to his servant in the course of his business. (3) When a person, who has wrongfully converted property, will not produce it, it shall be presumed as against him to be of the best description.

Notes. — The chief and important decision in the above case is that numbered (1), showing that a finder of property has a good title against all except the rightful owner. The evidence to be adduced on the trial of an action for damages for the wrongful conversion of goods — formerly called an action of trover — is (*a*) that the plaintiff was in possession of the goods, or had a right of property with the right to immediate

possession, (*b*) that the goods came to defendant's possession, (*c*) that he or his agent converted them, and (*d*) their value.

The student desiring to further consider the subject of wrongful conversion of goods is referred to the following cases on that subject: *Hollins* v. *Fowler*, L. R. 7 H. L. 757; 20 W. R. 208. *Cochrane* v. *Rymill*, 27 W. R. 176; *National Mercantile Bank* v. *Hampson*, L. R. 5 Q. B. D. 177; 28 W. R. 424; *Taylor* v. *McKeand*, 28 W. R. 628.

[The right of one having possession of property and a right in it is well illustrated by the case of *Shaw* v. *Caler*, 106 Mass. 448. The defendant, *as agent*, contracted with the plaintiff to make and finish piano-cases, and to furnish him shop-room for that purpose. The plaintiff had a lien upon the pianos, and retained possession of them until finished. The defendant, *as mortgagee*, took them from the plaintiff against his consent, and without showing evidence of title to the property, except mere assertion. In an action for conversion the plaintiff was entitled to recover the amount of his damage. The rule of the principal case is limited to lost and abandoned property.

Where an article is voluntarily or accidentally left by the owner upon the table or counter of a shop, the finder of it acquires no property in it as against the shop-keeper. (*McAvoy* v. *Medina*, 11 Allen 548.)

If the finder of a chose in action (e.g., a lottery certificate) notifies the vendor of it that it had been found by him, in an action by him against the vendor for money drawn by it, it was held that the action could not be sustained, because the defendants would be liable to the rightful owner, having knowledge that the ticket had been found. (*McLaughlin* v. *Waite*, 5 Wend. 405.)]

COLLINS v. BLANTERN.

(S. L. C. Vol. I. p. 667.)
(2 Wilson 341.)

In this case the plaintiff sued on a bond executed by certain parties, of whom the defendant was one, the obligation of which was £700 conditioned for payment of £350. The defendant pleaded the following facts, which showed that the consideration though not appearing on the face of the bond was illegal: Certain parties were prosecuted for perjury by one John Rudge, and pleaded not guilty. According to an arrangement the plaintiff gave his promissory note to the prosecutor, John Rudge, he to forbear further prosecuting, and as part of the arrangement the bond on which plaintiff sued was executed to indemnify him. The question was whether such a plea was good. *Decided:* That the plea was good, for illegality may be pleaded as a defence to an action on a bond.

Notes. — It will be observed that the instrument was one under seal, and that the case decides that though so under seal, and notwithstanding the rule that a contract under seal is binding on the party making it, whether there is a consideration or not, the defendant was not estopped from setting up the illegality.

(As to estoppel, see *post*, p. 94.)

["To render a promise illegal so as to vitiate a contract, it must appear to have been made for the sake of gain, and not merely from

motives of kindness and compassion." (*Ward* v. *Allen*, 2 Metc. 53.) Parties may agree to settle the private rights of one of them who has been injured; but if the injury is the consequence of a public offence, he cannot, upon any consideration, make a valid agreement to dispose of the rights of the public to prosecute the offender.]

MITCHELL v. REYNOLDS.

(S. L. C. Vol. I. p. 705.)
(1 P. Wms. 181.)

Here the defendant had assigned to the plaintiff a bake-house, and had executed a bond not to carry on the trade of a baker within the parish for a period of five years, under a penalty of £50. This action was now brought on the bond, and the defendant pleaded that it was void at law. *Decided:* That the bond was good, as it only restrained the defendant from trading in a particular place, and was on a reasonable consideration, but that it would have been otherwise if on no reasonable consideration, or to restrain a man from trading at all.

MALLAM v. MAY.

(11 M. & W. 653.)

By articles it was agreed that defendant should become assistant to the plaintiffs in their business of surgeon-dentists for four years; that plaintiffs should instruct him in the business of a surgeon-dentist, and that after the expiration of the term the defendant should not carry on that business in London or in any

of the towns or places in England or Scotland where the plaintiffs might have been practising before the expiration of the said service. *Decided:* That the stipulation not to practise in London was valid, the limit of London not being too large for the profession in question, and that the stipulation as to not practising in towns where the plaintiffs might have been practising during the service was an unreasonable restriction, and therefore illegal and void; but that the stipulation as to not practising in London was not affected by the illegality of the other part.

Notes on these two Cases. — All contracts in general restraint of trade are, notwithstanding any consideration that may exist, perfectly void, because they tend to discourage industry, enterprise, and competition; and even with regard to contracts in limited restraint of trade, it is important to remember that to render them good they must always be founded on a reasonable consideration, and this notwithstanding that the contract may be under seal, in which we find an exception to the rule that contracts under seal require no consideration. The latter of the above two cases plainly shows that agreements in restraint of trade are divisible, i.e., part may be void while part remains good.

[The term "trade" is construed to mean all professions and kinds of business.

A contract not to disclose the secret or art of some trade, or to work for another exclusively, is not in restraint of trade.

A bond conditioned that the obligor shall never carry on, or be concerned in, the business of founding iron, is void. (*Alger* v. *Thacher*, 19 Pick. 51.)

The plaintiff covenanted with the defendant that he would not, for a limited time, be connected with the manufacture of certain articles in the county of Hamilton or in the United States. It was decided on demurrer to the declaration, that the covenant not to pursue the business in said county was valid, but not to pursue it in the United States was void; and that the declaration should allege a partial restraint of trade a valuable consideration, and that the restraint is reasonable and not oppressive. (*Lange* v. *Werk*, 2 Ohio St. 519.)]

SIMPSON v. HARTOPP.

(S. L. C. Vol. I. p. 727.)
(4 T. R. 568; Willes 514.)

Decided: Implements of trade are privileged from distress for rent, if they be in actual use at the time, or if there be any other sufficient distress on the premises.

Notes. — Distress, which is a remedy by the act of the party, has been defined as the taking of a personal chattel out of the possession of the wrongdoer into the custody of the injured person, in order to procure a satisfaction of the wrong done (3 Stephen's Comms., 8th ed. p. 247). It may be useful here to give a statement of things privileged (*a*) from distress, and (*b*) from execution.

(*a*) The following are privileged from distress: —

1. Things in the personal use of a man.
2. Fixtures affixed to the freehold.
3. Goods of a stranger delivered to tenant to be wrought on in the way of his ordinary trade.
4. Perishable articles.
5. Animals *feræ naturæ*.
6. Goods in *custodia legis*.
7. Instruments of a man's trade or profession, though not in actual use, if any other sufficient distress can be found.
8. Beasts of the plough, instruments of husbandry, and beasts which improve the land, if any other sufficient distress can be found.
9. Loose money.
10. Lodgers' goods, by force of the statute 34 & 35 Vict. c. 79.

(*b*) The following are privileged from being taken in execution: —

1. Wearing apparel and bedding, and implements of trade of any judgment-debtor not exceeding £5.
2. Goods of a stranger.

3. Goods in *custodia legis*.
4. Fixtures affixed to the freehold.
5. (In the case of an elegit.) Advowsons in gross, and glebe lands.

(As to the effect of any irregularity in making a distress, see *ante*, p. 14; and generally as to distress, see Indermaur's "Principles of the Common Law," Am. ed. pp. 70–75.)

[The statutes of the several States exempting property from attachment on mesne process, or from being seized to satisfy execution, should be consulted.]

OMICHUND v. BARKER.

(S. L. C. Vol. I. p. 739.)
(Willes 550.)

The question in this case was whether the evidence of witnesses of the Gentoo religion, and sworn according to that religion, was admissible. *Decided:* That the evidence was admissible, and that whenever a witness believes in the existence of a God who will punish him in this world, his evidence must be admitted.

Notes. — In later cases it has been decided that to render the evidence admissible, the belief of the witness must be in the existence of a God who will punish in a *future* world. However, now by 32 & 33 Vict. c. 68, s. 4, it is provided that on objection to take an oath in any civil or criminal proceeding, such person shall, if the presiding judge[1] is satisfied that the taking of an oath would have no binding effect on him, make the following promise and declaration: "I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth;" and the person making such promise and declaration is to be liable for perjury in the same way as if he had taken an oath.

It may be useful here to give a short statement of the law as to the admissibility of witnesses, which now stands as follows: —

6 & 7 Vict c. 85. — No person offered as a witness shall be hereafter excluded by reason of incapacity from crime or interest from giving evidence.

14 & 15 Vict. c. 99. — Parties to actions and suits, and the persons on whose behalf same are brought and defended, shall (with certain

[1] By 33 & 34 Vict. c. 49, this is to extend to any person or persons having by law authority to administer an oath.

exceptions) be competent and compellable to give evidence; but this is not to render a party charged with a criminal offence able to give evidence for or against himself.

16 & 17 Vict. c. 83. — Husbands and wives are to be competent and compellable witnesses, except in criminal cases; but husband or wife not compelled to disclose any communication made during marriage.

32 & 33 Vict. c. 68. — Parties in breach of promise cases and adultery proceedings are competent witnesses; but in adultery proceedings parties are not bound to confess the adultery unless they have given evidence in disproof of adultery, and, in breach of promise cases, the evidence of the plaintiff must be corroborated by some material evidence in support of the promise.

17 & 18 Vict. c. 125, ss. 22–27, also contains important provisions as to evidence.

[It is now generally settled in this country, that if a witness has a religious sense of accountability to an Omniscient Being who is invoked by oath, it is not material whether the witness believes punishment will be inflicted in this world, or in the next. (Greenl. Ev. vol. 1, s. 369.) See the statutes of the various States.]

MILLER v. RACE.

(S. L. C. VOL. I. p. 808.)
(1 BURR 452.)

Decided: That the property in a bank note passes like cash by delivery, and a party taking it *bonâ fide, and for value,* is entitled to retain it as against a former owner from whom it was stolen.

Notes. — This case establishes the above principle in favor of all negotiable instruments, that is, instruments the property in which passes by delivery so as to give the transferee a right to sue on them in his own name. But if the party taking the negotiable instrument has been guilty of *mala fides*, he will not be entitled to retain it against the true owner, and gross negligence in taking the negotiable instrument seems to constitute sufficient *mala fides.*

As to other things, a purchaser, if they are stolen, acquires no title unless he bought in market overt and *bonâ fide*, and even then, if the offender is prosecuted to conviction no title is acquired, as they revert on conviction to the owner. If goods are sold by a person who found them, they may be recovered by the owner from the person who bought them.

There being this difference between things negotiable and not negotiable, it may be well to quote the following passage from "Smith's Leading Cases:" "It may be laid down as a safe rule that where an instrument is by the custom of trade transferable like cash by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument, and the property in it passes to a *bonâ fide* transferee for value though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e., if it be either not accustomably transferable, or though it be accustomably transferable, yet, if its nature be such as

to render it incapable of being put in suit by the party holding it *pro tempore*, it is *not* a negotiable instrument, nor will delivery of it pass, otherwise than by estoppel, the property of it to a vendee, however *bonâ fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt." (7th Am. ed. 815.)

[By the leading authority in this country, it was decided that nothing short of *bad faith* would overcome the title of a holder of a negotiable instrument, and that the burden of proof is on him who assails the title. And gross negligence is not evidence of *mala fides*. (*Goodman* v. *Simonds*, 20 How. (U.S.) 343.)

The want of consideration alone is not sufficient to cast the burden of proof upon the plaintiff.

In cases where the title to negotiable instruments is not in question, but the defence of fraud or forgery is set up, a recent case upon review of the law upon the point decides, that when the maker of a promissory note is not guilty of negligence in signing it, and putting the same in circulation, he is entitled to the same defence as he would have against the original holder, although the holder of the note paid a valuable consideration for it, but does not show that he bought it in the usual course of business, and paid full value for it. (*Millard* v. *Barton*, 13 R.I.—26 Alb. L. J. 191.) The doctrine of market overt does not obtain in this country.]

MISA v. CURRIE.

(L. R. 1 App. Cases 554.)
(45 L. J. Ex. 852.)

In this case the defendant drew a check for £1,999 3*s.* in favor of one Lizardi or bearer, and he paid it to the plaintiffs, his bankers, in consideration and on account of an amount owing to them exceeding that sum on his overdrawn account. Before presentment of the check Lizardi stopped payment, whereby the consideration for the defendant giving the check failed, and he accordingly instructed his bankers not to honor it. This was an action brought to recover the amount of the check. *Decided* (Lord Coleridge, C.J., dissentient): That the plaintiffs were entitled to recover.

Notes. — This case is placed here to follow that of *Miller* v. *Race*, as relating to negotiable securities, and it is a decision of very considerable importance, though it must be considered somewhat weaker than it would have been had the Lord Chief Justice concurred in the judgment.

In the circumstances of this case, which are very briefly stated above, had the check remained in the hands of Lizardi, the original drawee, the consideration failing, of course no action could have been maintained on it. And, again, had he parted with it for value then paid *bonâ fide* without the party taking it having any notice of his infirmity of title, there could have been no doubt but that the party so taking it must have had a perfect title to it and right to the money. But here the great difference and point in the case was, that it was paid over on account of a pre-existing debt, and on this ground of no value being

then paid, the Lord Chief Justice considered that the defendant ought to have judgment. The majority of the Court, however, clearly decided that this made no difference, and that the plaintiff was entitled to recover, the ground and reasoning for the decision being that a creditor to whom a negotiable security is given on account of a pre-existing debt, holds it by an indefeasible title.

As relating to the subject of checks, it may be useful to here remind the student of the Crossed Checks Act, 1876 (39 & 40 Vict. c. 81). Under this Act, if a check is crossed generally, it must be paid through some bank, and if crossed specially, through the particular bank named; and if a banker pays a check so crossed otherwise than in these ways, he is rendered liable to the true owner for any loss he may sustain owing to the check having been so paid. In addition to this, a check if crossed either generally or specially, may also be crossed with the words "not negotiable;" and if a person takes a check bearing these words, he is not to be capable of giving a better title to it than that which the person from whom he took it had.

[A pre-existing debt is a sufficient consideration for a promissory note, by the weight of authority in America, and whether or not it be taken in payment of, or as collateral security for, such debt. (*Swift* v. *Tyson*, 16 Pet. 1. See, contra, *Bay* v. *Coddington*, 5 Johns. Ch. 54.)

But whether or not a negotiable promissory note is taken in extinguishment of such a debt depends upon the intention of the parties. It is *prima facie* so taken.

Where one purchases a bill or note, as a chattel, from one who passes the title to it by delivery, the purchaser can claim no warranty of the solvency of the maker from the seller. (*Day* v. *Kinney*, 131 Mass. 37.)]

WIGGLESWORTH v. DALLISON.

(S. L. C. Vol. I. p. 900.)
(Dougl. 204.)

Decided: That a custom that the tenant of land, whether by parol or deed, shall have the away-going crop, after the expiration of his term, is good, if not repugnant to the lease under which the tenant holds.

Notes. — But if the lease contains certain stipulations as to the mode of quitting, then, of course, that puts out the custom, and the terms in the lease prevail, which is in accordance with the maxim, "*Expressum facit cessare tacitum.*" It may be stated as a general rule that whenever there is any certain well-known and established usage or custom, and parties contract on a matter connected with it, they will be presumed to have intended to make such usage or custom a part of their contract, and it will be deemed to be incorporated therewith unless there is any thing in the express contract to exclude its application.

[Where one in possession of premises from year to year, whose term expired on the first day of April, and who had sowed a crop during the previous autumn, evidence of a custom for a tenant from year to year to have the away-going crop when his term expires on the first day of April, was proof of the right to the crop, no express agreement to the contrary. (*Foster* v. *Robinson*, 6 Ohio St. 95.)

The lessee of a mortgagor is not entitled to have a crop on the mortgaged premises at the time of foreclosure, as against the mortgagee. (*Lane* v. *King*, 8 Wend. 584.)]

KEECH v. HALL.

(S. L. C. Vol. I. p. 879.)
(Dougl. 21.)

Decided: That a mortgagee may recover in ejectment *without giving notice to quit,* against a tenant claiming under a lease from the mortgagor made after the mortgage without the privity of the mortgagee.

MOSS v. GALLIMORE.

(S. L. C. Vol. I. p. 926.)
(Dougl. 279.)

Decided: That a mortgagee, after giving notice of the mortgage to a tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues after, and he may distrain for it after such notice.

Notes on these two Cases. — It is well to observe carefully the different results arising from these two cases. The mortgagor having mortgaged his property cannot himself (subject to the provisions of the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41) grant any valid lease, and any such lease is in fact a nullity, and being so the mortgagee can of course avoid it altogether; but if the mortgagor before the mortgage made a lease, that is perfectly good, and the mortgagee cannot avoid it, but to obtain the full benefit of his security he can give notice

to the tenant, and obtain not only accruing rents, but also rent in arrear, towards liquidation of the amount due on his security.

The different remedies which a mortgagee has, after default, to obtain payment of his mortgage money are as follows: (*a*) Ejectment against mortgagor and his tenants since the mortgage, as decided in *Keech* v. *Hall*. (*b*) Suing on bond or covenant. (*c*) Obtaining rents from tenants prior to the mortgage by giving notice, as decided in *Moss* v. *Gallimore*. (*d*) Selling under the power of sale in mortgage deed, or under the power formerly given by 23 & 24 Vict. c. 145, but now by 44 & 45 Vict. c. 41. (*e*) When in possession cutting timber if security insufficient. (*f*) Foreclosing. If a mortgagee forecloses and then sues, the effect of suing is to open the foreclosure and give the mortgagor a renewed right to redeem; and therefore, if a mortgagee forecloses and then sells, he cannot afterwards sue, because he no longer has the mortgaged estate ready to be redeemed if the mortgagor should choose to redeem (*Lockhart* v. *Hardy*, 9 Beav. 349). But although this is so, yet it is decided that a mortgagee, after selling *under his power of sale*, may sue on the covenant to pay (*Rudge* v. *Rickens*, 28 L. T. 537).

A mortgagee may exercise his different remedies as he pleases, even concurrently. A mortgagee will not be entitled to add to his mortgage debt sums expended at his own motion for general improvement, but he will be allowed to add sums expended for necessary repairs, protecting the title, or renewing renewable leaseholds. But neither a mortgagee nor mortgagor is actually bound to renew a renewable leasehold in the absence of contract so to do.

[A lessee of premises can only take a title commensurate with that of his landlord. And when the premises are under mortgage at the time of their demise, the lessee takes no title, and his entry into the premises is a trespass unless the mortgagor is permitted to remain in possession; but as rent goes with the reversion, and a demise of the property prior to the mortgage conveys a good title, the mortgagee takes the rent after notice of the mortgage, while the tenant is in of right. See 4 Kent, 12th ed. pp. 157, 158.

Actual possession lawfully taken by the mortgagee who threatens to expel a lessee holding the premises by lease made subsequent to the mortgage, unless he pay rent, is equivalent to an actual and complete eviction. (*Smith* v. *Shepard*, 15 Pick. 147.)]

MOSTYN v. FABRIGAS.

(S. L. C. Vol. I. p. 1024.)
(Cowp. 161.)

This was an action against the Governor of Minorca for trespass and false imprisonment in Minorca, and after verdict for the plaintiff, the principal question on a bill of exceptions was whether any action could be maintained by a native of Minorca for an injury committed there. *Decided:* That the action would lie, being of a transitory nature, but that if it had been strictly local no action could have been maintained in England.

Notes. — *Local* actions are those founded on some cause of action which necessarily refers to some particular locality; *transitory* actions are those founded on a cause of action which might take place anywhere.

By the Rules in the Schedule to the Judicature Act, 1875 (38 & 39 Vict. c. 77), the whole law of venue is abolished, Order 36, r. 1. providing as follows: —

"There shall be no local venue for the trial of any action, but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall in his statement of claim name the county or place in which he proposes that the action shall be tried, and the action shall, unless the judge otherwise orders, be tried in the county or place so named. Where no place of trial is named in the statement of claim, the place of trial shall, unless the judge otherwise orders, be the county of Middlesex."

The defendant, however, is not at all absolutely bound by the place of trial as chosen by the plaintiff; he may apply to change the place

of trial, and if he can show that some other place would be more convenient or a saving of expense to the parties or witnesses, or that he cannot obtain a fair trial at the place chosen by the plaintiff, his application will be entertained and the place of trial changed. (See hereon Indermaur's "Manual of Practice," 2d ed. 78.)

LICKBARROW v. MASON.

(S. L. C. Vol. I. p. 1147.)
(2 T. R. 63.)

Decided: That the consignor of goods may stop the goods *in transitu* before they get into the hands of the consignee on the bankruptcy or insolvency of the consignee; but if the consignee has assigned the bill of lading to a third person for a valuable consideration *bonâ fide* without notice, the right of the consignor is gone.

Notes. — "Stoppage *in transitu*," which is a prevention of wrong by a mere personal act, is the right which a vendor having sold goods on credit has to stop them on their way to the vendee, *before they have reached him*, on his becoming bankrupt or insolvent. If the goods have actually reached the vendee, or an agent on the part of the vendee, then the right is gone, as the very name "stoppage *in transitu*" imports. The rule to be collected from the cases is stated to be that the goods are "*in transitu*" so long as they are in the hands of the carrier as such, whether he was or was not appointed by the consignee, and also so long as they remain in any place of deposit connected with their transmission. But that if after their arrival at the place of destination they be warehoused with the carrier, whose store the vendee uses as his own, or even if they be warehoused with the vendor himself, and rent be paid for them, that puts an end to the right to stop "*in transitu*." It is not necessary in exercising the right of stoppage *in transitu*, that the vendor should actually seize the goods, for notice to the carrier or other forwarding agent is enough.

As to the latter part of the decision in the above case see also now 40 & 41 Vict. c. 39, s. 5.

[Insolvency may be proved by circumstances.

Stoppage *in transitu* is effected by mere notice to a carrier of the goods to which the vendor's lien is to attach. A general or special agent may exercise the right of stoppage *in transitu*, though he be not authorized to do a particular act. But a common carrier, when a question arises, is entitled to a reasonable time to ascertain the facts of the case, have the agent produce his authority and give the carrier security against loss by indemnity. (*Reynolds* v. *B. & M. R.R. Co.*, 43 N.H. 580.) A common carrier's receipt, not negotiable, delivered by the owner to one as security for advances of money on the goods shipped, with the intention to transfer the property in them to the latter, is a sufficient delivery of it, and vests a special property in it as against an officer attaching it against the general owner. (*Nat. Bank Green Bay* v. *Dearborn*, 115 Mass. 219.) An indorsement of a bill of lading passes the property to the indorsee.]

PIGOT'S CASE.

(11 Rep. at fol. 27 *a*.)

Decided: That if an obligee himself alters a deed, either by interlineation, addition, erasing, or by drawing a pen through the line, &c., although it is in words not material, yet the deed is void; but if a stranger without his privity alters the deed by any of the said ways in any points not material, it shall not avoid the deed.

MASTER v. MILLER.

(S. L. C. Vol. I. p. 1254.)
(4 T. R. 340.)

Decided: That an unauthorized alteration in a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument, and no action can be maintained upon it, even by an innocent holder for valuable consideration.

ALDOUS v. CORNWELL.

(L. R. 3 Q. B. 573.)
(37 L. J. Q. B. 201.)

Here a promissory note made by defendant expressed no time for payment, and while it was in the possession

of the payee (the plaintiff) the words "on demand" were added without the assent of the maker. This action was now brought on the note; and on the plea of the defendant that he did not make it. *Decided:* That as the alteration only expressed the effect of the note as it originally stood, and was therefore immaterial, it did *not* affect the validity of the instrument.

Notes on these three Cases. — *Pigot's Case* related only to deeds, but *Master* v. *Miller* extended its doctrine, as far as regarded material alterations, to bills of exchange, and subsequent cases have applied it indiscriminately to all written instruments whether under seal or not. However, it is not now entirely good law, for such an immaterial alteration in a deed or other writing as filling in a date where a blank is left, though done by the party, does *not* at all vitiate it. *Aldous* v. *Cornwell* is cited as being a recent case, and plainly showing that a mere immaterial alteration in a negotiable instrument does *not* affect it. If a material alteration is made in an instrument by consent, the instrument is a new contract requiring a new stamp, unless such alteration was made to correct a mistake and make the instrument what it was originally intended to be. (Indermaur's "Principles of the Common Law," Am. ed. pp. 151, 152.)

[A material alteration in a promissory note without the consent of the maker adds a new element to the contract. And a maker may successfully defend an action on the note on the ground that he never signed it. He never assented to the liability incurred by the contract declared upon.

The addition by the payee of the words "or order" to a promissory note vitiates it in the hands of *bonâ fide* holder, as against the surety, although the maker consents to the alteration. (*Haines* v. *Dennett*, 11 N.H. 180.) If one affix his name to a negotiable instrument as subscribing witness, after its execution, it is materially changed. (*Thornton* v. *Appleton*, 29 Me. 298.) After the acceptance of a bill of exchange which had been drawn in the partnership name, the names of the individual members of the firm were signed under the drawer's name; and it was held to be immaterial. (*Blair* v. *Bank of Tenn.*, 11 Humph. 84.)]

WAUGH v. CARVER.

(S. L. C. Vol. I. p. 1289.)
(2 Hen. Blackstone 235.)

Here certain ship agents at different ports entered into an agreement to share in certain proportions the profits of their respective commissions and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c. *Decided:* That by this agreement they became liable as partners to all persons with whom either contracted as such agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each for his own ; for he who takes the general profits of a partnership must of necessity be made liable to the losses, and he who lends his name as a partner becomes as against all the world a partner.

COX v. HICKMAN.

(8 H. L. Cas. 268.)

Here S & S becoming embarrassed had executed a deed assigning their property to trustees whom they empowered to carry on the business under the name of the Stanton Iron Company, and do all necessary acts,

with power to the majority of the creditors assembled at a meeting to make rules for conducting the business or to put an end to it, and after the debts had been discharged the property was to be re-transferred by the trustees to S & S. Two of the creditors, C and N, were named amongst the trustees; C never acted; N acted for six weeks and then resigned. Some time afterwards the other trustees who continued to carry on the business became indebted to H, and gave him bills accepted by themselves "per proc. the Stanton Iron Company." *Held:* That there was no partnership created by the deed, and that consequently C and N could *not* be sued on the bill as partners in the company.

Notes on these two Cases. — *Waugh* v. *Carver* is given in "Smith's Leading Cases," as the leading authority on the question of what constitutes a partnership, but *Cox* v. *Hickman* is a later case, and perhaps a better authority to quote on the point. A partnership may be either actual or nominal, an actual partnership being where two or more persons agree to combine money, labor, or skill, in a common undertaking, sharing profit and loss. (Indermaur's "Principles of the Common Law," Am. ed. 127, 128.) The mere participation in profits does not necessarily render a person liable as a partner, but it is a strong test of partnership, and there no doubt are some cases in which upon such participation alone it may be inferred as a fact, that a partnership does exist, but this must depend on the circumstance of each particular case, and now by 28 & 29 Vict. c. 86, in certain cases the mere participation in profits shall not be any test whatever of the existence of a partnership, it being enacted by that statute that none of the following events shall of themselves constitute a partnership: —

(1) The advance of money by way of loan to a person engaged in a trade or undertaking upon a contract to receive interest varying with the profits or a share of the profits.

(2) A contract for the remuneration of a servant or agent of any person engaged in a trade or undertaking by a share of the profits.

(3) The receiving by a widow or child of the deceased partner of a trader of a portion of the profits by way of annuity.

(4) The receiving by any person of a portion of the profits of any business in consideration of the sale by him of the goodwill of such business. But in the case of bankruptcy, &c., the lender of any such loan, or the vendor of any such goodwill, is not to be entitled to recover any such profit as aforesaid until the claims of the other creditors for valuable consideration have been satisfied.

A dormant partner is one who, though not appearing as a partner, yet in reality is one, and he is liable in common with other partners, and a nominal partner is one who, without participating in the profits, yet lends his name to the firm, and he is liable to third parties if his holding himself out as a partner has come to their knowledge, and they gave credit upon the strength of his name. Though partners are jointly interested, yet, on death of one, his share forms part of his own personal estate, and though on the death of one the legal interest in choses in action survives to the others, yet they are in equity but trustees of the share of deceased partner. The power of one partner to bind the other or others depends on the ordinary principles of agency, and in the same way that a general agent binds his principal by all contracts coming within the scope of his agency, so one partner binds the other or others by all such transactions as are within the scope of the partnership dealings, though the partners may have privately agreed that no such power shall exist. Thus, in mercantile partnerships one partner can bind the others by a bill of exchange, though one member of a firm of solicitors would have no such power; but a partner cannot bind his firm by a deed unless he is authorized by deed so to do. A partner is not liable on contracts entered into before he became a member of the firm.

A partnership may be dissolved:—

1. By effluxion of time.
2. By mutual consent.
3. If a partnership at will by a notice, unless such dissolution would be in ill faith, or would work an irreparable injury.
4. By a general assignment by one or more partners, or by execution on the partnership effects by a creditor of one of the partners, or by an assignment of his share in the business, or by his bankruptcy, or outlawry, or attainder for treason or felony.
5. By death of a partner.
6. By marriage of a female partner, and

7. By decree of the Chancery Division of the High Court of Justice which will be granted on any of the following grounds: (*a*) Where the partnership originated in fraud, misrepresentation, or oppression; or (*b*) Where it cannot be carried on at all, or at least according to the stipulations in the articles or without injury to all the partners; or (*c*) Where an active partner is permanently insane, or incapable; or (*a*) Where a person is guilty of gross misconduct as partner, or Where there are continual breaches of the partnership articles by one of the partners. (See Snell's "Principles of Equity," 5th ed. 499.)

[The doctrine declared by the case of *Waugh* v. *Carver* is followed in New York. (*Leggett* v. *Hyde*, 58 N.Y. 272.) But the rule laid down in *Cox* v. *Hickman* seems to be the better one, and it is adopted in the case of *Eastman* v *Clarke*, 53 N.H. 276, where it is said that sharing profits in any other sense than that of principal is not an absolute test of one's liability as partner. But one's liability as partner to third persons depends upon whether or not he has personally, or by an agent, made an express contract, or whether he is estopped to deny a partnership within the doctrine of estoppel.

If the parties doing business together intended to enter into a partnership, an agency is conferred upon each one of them to bind the others as principals, and each holds a dual position, — that of principal and agent. If one be an agent merely, he cannot be bound by the acts of his associates; but if by the conduct of all of them (including himself) he is made to appear as a principal, he is estopped to deny a partnership. (*Denny* v. *Cabot*, 6 Metc. 82.)]

CUTTER v. POWELL.

(S. L. C. Vol. II. p. 17.)
(6 T. R. 320.)

Here the defendant gave to one Cutter deceased a note as follows: "Ten days after the ship *Governor Parry*, myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate to the said ship from hence to the port of Liverpool, Kingston; the 31st of July, 1793." Cutter died during the voyage, and this action was brought by his representatives. *Decided:* That deceased not having proceeded, continued, and done his duty for the whole voyage, nothing could be recovered by his representatives.

Notes. — The general rule is that while the special contract remains unperformed, no action of *indebitatus assumpsit* can be brought for any thing done under it. But if the special contract has been abandoned or rescinded by the parties, then an action will lie for what has been done, by the person suing on a *quantum meruit* — that is, for as much as it is worth; and if A and B enter into a special contract, and A refuses to perform his part of it or renders himself absolutely unable to do so, it is open to the other party to at once rescind such special contract, and immediately sue on a *quantum meruit* for whatever he has done under the contract previously (see *Planché* v. *Colburn*, 8 Bing. 14).

[The above case was decided under peculiar circumstances, and is not followed in similar cases, unless the entirety of the contract is to be main-

tained. Where one agreed with another to work "seven months at twelve dollars per month," but left the service *without* good cause before the expiration of that time, it was held that he could not recover for the service rendered. (*Davis* v. *Maxwell*, 12 Metc. 286.) But where there is an entire contract for personal services, there is an implied condition that inability to perform it, caused by sickness, accident, or death, shall not prevent recovery for reasonable value of services rendered. And this class of contracts is distinguished from those that might be performed by an agent. (*Ryan* v. *Dayton*, 25 Conn. 188.) And one may recover for his services, although he fails to complete his contract after regaining his health. (*Fenton* v. *Clark*, 11 Vt. 557.)]

BICKERDIKE v. BOLLMAN.

(S. L. C. Vol. II. p. 66.)
(1 T. R. 405.)

Decided: That notice of dishonor of a bill is not necessary if the drawer had no effects in the hands of the drawee, so that he could not be injured for want of notice.

Notes. — The result of this decision may be illustrated thus: A draws on B, who accepts for A's accommodation, and on presentment to B the bill is dishonored; to entitle the holder to sue A (the drawer) it is *not* necessary to give him any notice of dishonor, because as he had no assets in B's hands, he cannot possibly be injured. Were it an ordinary acceptance, of course the drawer could not be sued unless notice of dishonor was duly given to him. But it has been decided that the principle of this case must not be extended, and notice must be given if the drawer have reason to expect that some third party will provide for payment of the bill; and if the drawer had effects in the drawee's hands at the time when the bill was drawn, he does *not* lose his right to notice, although before the time of payment he may have ceased to have any.

The proper time for giving notice of dishonor when the person lives at or near the place of dishonor, or where the giver of notice himself received notice, is such a time that it may be received by the expiration of the day after the dishonor, or after the time when the giver of the notice himself received notice, for each indorser "has his day" for giving notice. When the person is not living at or near the place it is enough to give notice by the post of the next post day, or when it is a foreign bill, by the next ordinary conveyance. When the bill is at a banker's the banker has a day to give notice to customer, and the customer, another day to give notice to the prior parties.

A check should be presented for payment by the day after the day of its receipt, or, if the parties live at a distance, forwarded for presentment within that time, and the result of this time not being observed is to exonerate the drawer of the check if the banker fails in the mean time, having assets of the drawer. It is not necessary to give notice of dishonor of a check if there were no sufficient effects at the time when the drawer would naturally expect the check to be presented and the drawer had no reasonable expectation that the check would be cashed.

[When the drawer of a bill of exchange *knows* that it will not be honored by the drawee, he will not be entitled to notice of dishonor, because he cannot be injured from want of notice. Knowledge is imputed to him if he have no funds, or no reasonable expectation of having any, in the hands of the drawee, or should he intercept funds on the way to the drawee and have no right to draw. So, too, where one partner draws on the firm. (*Hopkirk* v. *Page*, 2 Brockenbrough C. C. 20.) War between the States in which the drawer and holder reside will suspend notice of dishonor until peace is restored. (*House* v. *Adams*, 48 Penn. St. 261.)

If the indorser of a bill of exchange be an *accommodated* party, he is not entitled to notice of dishonor for non-payment. (*French* v. *The Bank of Columbia*, 4 Cranch 153.)]

I'ANSON v. STUART.

(1 T. R. 748.)

Decided: That to print of any one that he is a swindler, is a libel and actionable, for it is not necessary, in order to maintain an action for libel, that the imputation should be one which if spoken would be actionable as a slander.

Notes. — The legal point to remember in this case is that writing may constitute a cause of action as a libel, when the words if only spoken would not without proof of special damage. Words which are slanderous in themselves, i.e., will support an action without any proof of special damage, are words which impute (1) some offence punishable by the criminal law, or that a man has been actually convicted; or (2), some misconduct or incapacity in the plaintiff's trade, profession, or office; or (3), that the plaintiff actually labors under a contagious disorder, the imputation of which may exclude him from society; [or (4), an imputation of disherison.]

It may here be noted that it was decided in the case of *The Prudential Assurance Co.* v. *Knott*, L. R. 10 (Ch.) 142; 44 L. J. (Ch.) 192, that the Court had no power to interfere by way of injunction to restrain the publication of a libel, as such, even though injurious to property; but in the more recent cases of *Thorley's Cattle Food Co.* v. *Massam*, 6 Ch. D. 582; 46 L. J. (Ch.) 713, and *Thomas* v. *Williams* (14 Ch. D. 864; 49 L. J. (Ch.) 605), it has been held that notwithstanding the above case, it has *now* power to interfere by way of injunction by force of the provision in the Judicature Act, 1873, sect. 25, sub-sect. 8. Having reference to the wide words of that enactment, these later decisions are no doubt correct.

[To publish language imputing wilful falsehood to a school-teacher is libellous, and was held actionable. (*Lindley* v. *Horton*, 27 Conn. 58.)

But there must be a publication of the words to show that one has been libelled. Writing a letter to one which contains slanderous words against him is not a publication. But where one requested another to write a letter to the plaintiff, to which the former signed his name and kept a copy, and stated the contents of it, without producing the copy, it was held that a publication had been shown. (*Adams* v. *Lawson*, 17 Gratt. 250.) The truth of the charge in civil cases is a defence.]

CLAYTON v. BLAKEY.

(S. L. C. Vol. II. p. 106.)
(8 T. R. 3.)

Decided: That though by the Statute of Frauds (29 Car. 2, c. 3, s. 1), it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease may be made to enure as a tenancy from year to year.

DOE d. RIGGE v. BELL.

(S. L. C. Vol. II. p. 100.)
(5 T. R. 471.)

Decided: That, although a lease is void by the Statute of Frauds (29 Car. 2, c. 3, s. 1), and therefore the tenant holds not under the lease, but as tenant from year to year, yet such holding is governed by the terms of the lease in other respects.

Notes on these two Cases. — The principle upon which the tenancy, which by 29 Car. 2, c. 3, s. 1, it is declared, not being created by writing, shall be only a tenancy at will, is converted into a tenancy from year to year, is, that originally in accordance with the statute it is but an estate at will, but afterwards by the payment of rent, or from other circumstances indicative of an intention to create such yearly tenancy, it

becomes converted into a tenancy from year to year, to which latter certain tenancy the Courts always lean in preference to the uncertain tenancy of an estate at will. For the rule to determine when a tenancy is at will, and when for years, see *Richardson* v. *Langridge* (Indermaur's "Con. & Eq. Cas.," 4th ed. p. 1).

The decision in *Doe* d. *Rigge* v. *Bell*, that the holding is regulated by the other terms of the lease, arises rather as a matter of evidence than of law. In that case the lease itself was void, but the same rule applies to the case of a tenant holding over after the expiration of his term under a valid lease, for in such a case after there has been a payment and acceptance of subsequent rent, the law, in the absence of any evidence to the contrary, implies that he continues to hold on such of the terms of the previous demise as are applicable to a tenancy from year to year.

[An estate held under a parol lease which is declared by statute to be a tenancy at will only, may grow into an estate from year to year. (*Barlow* v. *Wainwright*, 22 Vt. 93.) But in Maine, Massachusetts, and New Hampshire, the courts tend to hold that an estate declared by statute to be a tenancy at will cannot grow into an estate from year to year. (*Ellis* v. *Page*, 1 Pick. 45; *Davis* v. *Thompson*, 13 Me. 214; *Whitney* v. *Swett*, 2 Fost. 10.) In the latter case, it was held that written receipts showing payment of rent from year to year or from month to month proved no interest in the land greater than a tenancy at will.]

ELWES v. MAWE.

(S. L. C. Vol. II. p. 169.)
(3 East 38.)

Decided: That although tenants may remove fixtures erected for the purposes of their trades, yet tenants in agriculture cannot remove fixtures erected for the purposes of husbandry.

Notes. — This case is useful to cite on the general principle of fixtures, but the law contained in it is now altered, by 14 & 15 Vict. c. 25, and 38 & 39 Vict. c. 92. The first Act (s. 3) provides that buildings, engines, &c., erected for agricultural purposes, with the consent in writing of the landlord, shall remain the property of, and removable by, the tenant, so that he do no injury in the removal thereof; but before removal one month's notice shall be given to the landlord, who has the option of purchasing. The latter Act (which is the Agricultural Holdings Act, 1875), also contains a provision (sect. 53) on this subject, under which such fixtures may be removed although not erected with the consent in writing of the landlord, but a month's notice must still be given prior to removal. In the one case, however, of a steam-engine erected by a tenant this provision only applies if the tenant has before erecting it given to his landlord notice of his intention so to do, and the landlord has not by notice in writing to the tenant objected to the erection thereof.

The law, then, as to fixtures shortly stands thus: The tenant may remove those erected for the purposes of trade, domestic use, or ornament; or agricultural fixtures, as provided by the above statutes; but all such fixtures must be removed before the expiration of the term, or during such further period as the tenant holds under a right to consider himself as tenant, otherwise they become the property of the landlord, being considered as a gift in law to him.

Where either freeholds or leaseholds having fixtures thereon are mortgaged, the fixtures will pass to the mortgagee, and as to the question of whether such a mortgage is within the Bills of Sale Act, and requires to be registered, the rule before the Bills of Sale Act, 1878, was that it would be if the mortgagee was enabled under the mortgage deed to deal with the fixtures separately from the building, but not otherwise. (*Ex parte Barclay*, L. R. 9 Ch. App. 576; *Ex parte Daglish*, L. R. 8 Ch. App. 1072.) The subject is, however, now governed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31, s. 7).

[When a chattel is attached to the realty, or incorporated with the structure of which it forms a part, it becomes a part of the fee.

In determining the question whether or not a chattel has become a fixture, the courts now regard rather the purpose for which it is employed than the physical connection between it and the realty. (*Wadleigh* v. *Janovim*, 41 N.H. 503.) Reservations should be made in the deed itself: oral agreements are not binding.]

WAIN v. WARLTERS.

(S. L. C. VOL. II. p. 243.)
(5 EAST 10.)

Decided: That by the word "agreement" in the Statute of Frauds (29 Car. 2, c. 3, s. 4), must be understood not only the promise itself, but also the consideration for the promise; so that a promise appearing to be without consideration on the face of the written agreement was *nudum pactum*, and gave no cause of action.

Notes. — This decision is now subject to the statute 19 & 20 Vict. c. 97, s. 3, which provides that a guarantee shall not be invalid by reason only that a consideration does not appear in writing, or by necessary inference from a written document. But of course there must even here be a consideration, though it need not appear in the written document.

In the case also of bills of exchange and promissory notes, by the custom of merchants it is not necessary that the consideration should appear on the face of the instrument.

[In this country there has been considerable opposition to the doctrine of *Wain* v. *Warlters*, arising chiefly, it would seem, from the case of *Egerton* v. *Mathews* (6 East. 307), where the Court discriminates between the requisitions of the fourth section of the Statute of Frauds, wherein the word "agreement" is found, and the requisitions of the seventeenth section, wherein the word "bargain" is used. But the substantial grounds upon which *Wain* v. *Warlters* rests is the particular object of the fourth clause, which requires a *complete* memorandum in writing as proof of the contract.

Although the word "agreement" is found in the clause requiring a memorandum, in the statutes of Maine, Vermont, Massachusetts, Con-

necticut, North Carolina, Ohio, and Missouri, yet the doctrine of that case has been repudiated; while in New Hampshire, New York, New Jersey, Delaware, Maryland, South Carolina, Georgia, Indiana, Illinois, Michigan, Wisconsin, and Minnesota, the doctrine has been approved.

Owing to the wording of the statutes in some of the other States, the consideration need not be expressed in the memorandum. (Browne on the Statute of Frauds, s. 391.)]

DALBY v. INDIA AND LONDON LIFE ASSURANCE COMPANY.

(S. L. C. Vol. II. p. 282.)
(15 C. B. 365.)

Decided: (1) That the contract of life assurance is a contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, and that it is not a mere contract of indemnity, as policies against fire and marine risks.

(2) That the interest necessary under 14 Geo. 3, c. 48, s. 3, is an interest at the time of effecting the insurance and not at the time of the recovery of money; therefore although at the time of recovery the interest is gone, yet if at the time of effecting the insurance the person effecting it had a proper interest, he can recover.

HEBDON v. WEST.

(3 B. & S. 579.)

Decided: That, where there are several policies effected with different offices, the insured can recover no more from the insurers, whether on one policy or many, than the amount of his insurable interest.

Notes on these two Cases. — The case of *Dalby* v. *India and London Life Assurance Company* distinctly overrules that of *Godsall* v. *Boldero* (9 East. 72) (which will be found set out in "Smith's Leading Cases," vol. ii. p. 262), where it had been, in fact, decided that life, like fire assurance, was but a contract of indemnity. The above case is one of the greatest importance, as plainly laying down the rule that if a person has an interest at the time of effecting the life policy, he can afterwards recover, although his interest has gone; thus, if a creditor insures his debtor's life, although he is afterwards paid, yet he can recover from the insurance office.

It should be mentioned that the statute (14 Geo. 3, c. 48) referred to in the above case, does not extend to prevent individuals from effecting insurances upon their own lives, provided that it be done *bonâ fide.*

A wife has an insurable interest in the life of her husband, but a husband, parent, or child has no insurable interest in the lives of a wife, child, or parent, unless he or she has some interest in property dependent on their lives.

Perfect good faith is necessary in effecting a policy of insurance, and any fraud, misrepresentation, or even non-communication of material circumstances, by the party insuring, or his agents, will render the policy void. The maxim *caveat emptor* has here no application.

On the subject of marine insurance generally, and what is recoverable under special circumstances on such a policy, the student is referred to the recent case of *Aitcheson* v. *Lohre*, H. L. 49 L. J. Q. B. 123; L. R. 4 App. Cas. 755.

On the subject of fire insurance the recent case of *Rayner* v. *Preston* L. R. 14 Ch. D. 297, affirmed on appeal (James, L. J., dissenting), 50 L. J. Ch. 472, is of considerable importance. In that case there was a contract for the sale of a house which had been insured by the vendor against fire. After the date of the contract, but before the date fixed for completion, the house was burnt and the vendor received the insurance money from the office. The contract contained no reference to the insurance. It was held that the purchaser was not entitled as against the vendor to the benefit of the insurance, either by way of abatement of the purchase money or re-instatement of the premises. It was, however, left unsettled whether — a contract of fire insurance being only a contract of indemnity — the insurance company in such a case could not compel the vendor to refund the money they had paid him, if he got his full purchase money from the purchaser.

[It is believed that there is no case in this country in point with *Dalby*

v. *India &c. Assurance Co.* But the Court in the *Insurance Co.* v. *Bailey*, 13 Wall. 616, said that the contract of life insurance was not one of indemnity, and that the insured need not necessarily have a pecuniary interest in the life of the *cestui que vie*, except at the inception of the contract.

An equitable lien upon property is an insurable interest; as where a vendor made an assignment of his interest in a contract for the sale of real estate, which contract provided for insurance upon the estate by the vendee for the benefit of the vendor, such assignment was held to create an equitable lien in favor of the assignee, who was entitled to the insurance money under a policy effected in the name of the vendee. And the insurers, after notice, are trustees of the fund for his benefit. (*Cromwell* v. *The Brooklyn Fire Ins. Co.*, 44 N.Y. 42.)]

GEORGE v. CLAGETT.

(S. L. C. Vol. II. p. 125.)
(7 T. R. 359.)

Decided: That if a factor sells goods as his own, and the buyer does not know of any principal other than the factor, and the principal afterwards declares himself, and demands payment of the price of the goods, the buyer may set off any demand he may have on the factor against the demand made by the principal.

Notes. — In order to constitute a valid defence within the rule in this case all that is necessary to be shown is that the contract was made by a person whom the plaintiff had intrusted with the possession of goods, that that person sold them as his own goods in his own name as principal with the authority of the plaintiff, that defendant dealt with him as, and believed him to be the principal in the transaction, and that before the defendant was undeceived in that respect the set-off accrued. However, the rule only applies fully where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and though he may not be expressly told, still must be supposed to have known, that he was dealing, not with a principal, but with an agent, the reason for the rule ceases, and then *cessante ratione, cessat lex* (2 S. L. C. 127).

It has been decided, and somewhat extending the rule in the above case but yet strictly within its principle, that though the buyer knew at the time of buying of the person being a factor, yet he is entitled to this benefit of set-off if he honestly believed that the factor was entitled to sell and was selling to repay himself advances made for his principal. (*Warner* v. *McKay*, 1 M. & W. 595.)

It may be well to note here the powers of factors over goods in-

trusted to their possession. At common law the mere position of principal and factor confers a power to sell at such times and prices as the factor may in his discretion think best, but does not confer any power to pledge.

[A factor has a lien on the goods of his principal for his commissions and any money he has advanced for the principal. The factor may pledge the goods for his advances and the amount of his lien, and for the payment of duties or any charge allowed by the usage of trade. He has a special property in the goods, and may sell them in his own name, always acting within the scope of his authority, and, in the absence of it, according to the usages of trade.

His creditors in case of bankruptcy cannot claim property remitted by his principal when its identity can be clearly established.

Bonâ fide purchasers dealing with him as principal, and not having means of ascertaining the contrary, will be protected.

The presumption of exclusive credit may be rebutted.]

ADDISON v. GANDESEQUI.

(S. L. C. Vol. II. p. 342.)
(4 Taunt. 574.)

In this case the defendant, being abroad and desirous of purchasing certain goods, came to England and went to his agents, L. & Co. These agents purchased the goods for him from the plaintiffs, he selecting them, and the plaintiffs debited the agents, L. & Co., with the price. *Decided:* That the plaintiffs could not now recover the price against defendant, having known who the principal was, and yet debited the agents.

PATERSON v. GANDESEQUI.

(S. L. C. Vol. II. p. 342.)
(15 East, 62.)

The facts in this case were of a similar nature to those of the previous one, and on the trial the plaintiff had been nonsuited. A rule *nisi* was afterwards obtained to set aside the nonsuit, and on argument it was made absolute, the Court considering that there was some doubt whether or not the plaintiff knew of the defendant being the principal. But the following

general principles were laid down, agreeing with the previous case: That if the seller of goods, knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the *known* principal: but if the principal be not known at the time of the purchase made by the agent, it seems that, when discovered, the principal or the agent may be sued, at the election of the seller; unless where, by the usage of trade, the credit is understood to be confined to the agent so dealing, as particularly in the case of principals residing abroad.

THOMSON v. DAVENPORT.

(S. L. C. Vol. II. p. 342.)
(9 B. & C. 78.)

Here, Davenport sold goods to one M'Kune, who told him he was buying them on account of another person, *but did not mention the principal's name*, and Davenport did not inquire for it, but debited M'Kune. M'Kune failed, and Davenport sued Thomson, who was the principal, for the price. The verdict was given for the plaintiffs, and was now affirmed on writ of error, it being *decided:* That the seller might sue the principal for the price, he not having known who the principal was at the time.

Notes on these three Cases. — The above are the leading cases on the subject of principal and agent, and are usually cited together as being very closely connected, and jointly bearing on the point. The case of *George* v. *Clagett* (p. 76) is sometimes confused with these three cases, and for easy reference and consideration with them, it is here placed immediately preceding them. That was a case where the *owner of the goods* employed an agent to *sell* them, and afterwards declared himself: but these three cases are where goods were *purchased* by an agent, and the point is, who is liable for the price. The distinction is therefore evident.

An agent's authority may be determined in any of the following ways. —

1. By revocation.
2. By the agent's renunciation with principal's consent.
3. By principal's death.
4. By principal's bankruptcy.
5. By fulfilment of the commission.
6. By expiration of time.
7. When the agent is a *feme sole*, by her marriage.

In order to determine the agent's authority by revocation means should be used to make known such revocation as fully as the employment was known. To correspondents express notice should be given, and to strangers a general notice in the "Gazette." (See hereon Indermaur's "Principles of the Common Law," Am. ed. pp. 120, 121.)

[Death will not revoke an agency when the agent has a pecuniary interest in the subject-matter of his agency; but such interest must be a vested one.

The right of election in the matter of holding the principal or agent will of course be forfeited by a final determination to proceed against either when the creditor has full knowledge of both. (*Smith* v. *Plummer*, 5 Wharton 89.) But the seller must have *actual* knowledge as to who the principal is. Means of knowledge is not sufficient to estop him, where he has charged the goods to the agent of a purchaser. (*Raymond* v. *Crown & Eagle Mills*, 2 Metc. 319.)]

MANBY v. SCOTT.

(S. L. C. Vol. II. p. 417.)
(1 Sid. 109.)

Decided: That the wife's contract does not bind the husband unless she act by his authority.

MONTAGUE v. BENEDICT.

(S. L. C. Vol. II. p. 435.)
(3 B. & C. 631.)

This was an action against a husband for certain goods — *not* necessaries — delivered to the wife of the defendant. *Decided:* That as the goods were not necessaries, and there was no evidence to go to the jury of any assent of the defendant (the husband) to the contract made by his wife, the action could *not* be maintained.

SEATON v. BENEDICT.

(S. L. C. Vol. II. p. 417.)
(5 Bing. 28.)

This was an action against the same defendant as in the previous case. The claim was for certain goods —

which were in the nature of necessaries — delivered to the wife of the defendant. It was, however, shown that the defendant had supplied his wife's wardrobe well with all necessary articles. *Decided:* That a husband who supplies his wife with necessaries in accordance with her station is not liable for debts contracted by her without his previous authority or subsequent sanction.

Notes on these three Cases. — *Manby* v. *Scott* is a very old case which occurred in the reign of Charles II., and seems to be cited in "Smith's Leading Cases," in some degree, as a specimen of "that laborious process of investigation to which important questions of law were anciently submitted." The general principle established in that case is, however, still good law; but it must be remembered that, with regard to necessaries supplied to the wife, it may not be necessary to show any specific authority of the husband to charge him, for the wife from her position has an implied authority for that purpose unless the contrary appears; and in *Seaton* v. *Benedict* the contrary did appear, for the wife was sufficiently supplied with necessaries.

It has been decided in the case of *Jolly* v. *Rees* (15 C. B. (N.S.) 628), that any agreement between husband and wife or the fact of the husband forbidding the wife to pledge his credit, though not communicated to the tradesman, will be a bar to any action against the husband.

This decision has now been thoroughly confirmed by the recent case of *Debenham* v. *Mellon* ((H. L.) 50 L. J. Q. B. 155; L. R. 6 Q. B. D. 24), which decides that where husband and wife live together, and the husband has privately forbidden his wife to buy goods on credit, he is not liable for the price of articles of dress, although suitable to her rank in life, supplied to her by a tradesman with whom she has not dealt before, but to whom the fact that she was so forbidden has not been communicated.

It should here be mentioned, that if a man takes a woman to his house and lives with her as his wife, she stands in the same position with regard to her power to charge him as if she were actually married to him.

The whole power which a wife has to bind her husband for neces-

saries arises from the fact that during cohabitation there is *a presumption* arising from the very circumstance of the cohabitation of the husband's assent to contracts made by his wife for necessaries suitable to his degree and estate, which presumption is, however, as the cases of *Seaton* v. *Benedict*, *Jolly* v. *Rees*, and *Debenham* v. *Mellon* show, liable to be rebutted; and where the wife is living apart from the husband there is *no* presumption that she has any authority to bind him, and it must be shown that from the circumstances of the separation, or the conduct of the husband, she has such authority. When the husband and wife are living separate, the law as to the husband's liability is as follows: —

Firstly, Where they separate by mutual consent, and no allowance is made to the wife, she has an implied authority to bind him for necessaries.

Secondly, Where the husband unjustly expels his wife from the marital roof, or forces her to abandon it by his cruelty, she goes forth with an implied authority to bind him for necessaries.

Thirdly, Where they live separately, the husband allowing and paying the wife a sufficient sum for maintenance, she has no authority to bind him for necessaries. (See *Eastland* v. *Burchell*, 47 L. J. Q. B. 500; L. R. 3 Q. B. D. 432.)

Fourthly, Where the wife unlawfully and against the husband's consent leaves him, or if she elopes or lives in adultery, she has no implied authority to bind him.

[The doctrine of the principal cases is followed by the courts in this country, and the same rules of law arising therefrom, as stated by the author in his note to those cases, are also adopted. The statutes enacted in the various States removing the disabilities of married women, do not supersede the common law as enunciated here. They in no wise affect the doctrine of agency arising from cohabitation. But they are enabling, and confer the power on married women to bind themselves by express promise, or by inducing credit. See Kelly on Conts. of Married Women, *passim*.]

ROE v. TRANMAR.

(S. L. C. Vol. II. p. 416.)
(Willes, 682.)

Here it was held that a deed which could not operate as a release, as it attempted to convey a freehold *in futuro*, should nevertheless operate as a covenant to stand seized.

Notes. — The principle which this case carries out is one of great importance, forming, indeed, one of the first rules of construction of all written instruments, viz., "The construction shall be liberal; words ought to serve the intention, not contrarywise."

It appears convenient here to give some of the chief rules for the construction of deeds: —

1. A deed is to be expounded according to the intention, where that intention is clear, rather than according to the precise words used, for "*verba intentioni debent in servire*," and "*qui hæret in literâ, hærat in cortice.*"

2. To explain an ambiguity apparent on the face of a deed, no evidence *dehors* the deed itself is admissible.

3. The construction of a deed should be made upon the entire instrument, and so as to give effect, as far as possible, to every word that it contains.

4. The construction should be favorable, and such that "*res magis valeat quam pereat.*"

5. When any thing is granted, the means necessary for its enjoyment are also granted by implication; for it is a maxim that "*cuicunque aliquid conceditur, conceditur et id sine quo res ipsa non esse potuit.*"

6. If there be two clauses in a deed so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected.

7. Ambiguous words shall be taken most strongly against the grantor, and in favor of the grantee. "*Verba fortius accipiuntur contra preferentem.*" But this being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon but when all other rules of exposition fail; and it does not apply to a grant by the Crown at the suit of the grantee. (Stephen's "Commentaries," 8th ed. vol. 1, pp. 497–499.)

[In an important case in point with the principal case, it was decided that a deed made to take effect *in futuro* (at the grantor's death) is good as a covenant to stand seised to the grantee's use, notwithstanding the absence of any relationship between them by blood or marriage, the deed reciting a valuable consideration. (*Trafton* v. *Hawes*, 102 Mass. 533.) And in a recent case it was held that a deed made to take effect at the grantor's death, if the grantee should survive him, but not to be operative should there be no survival of the grantee, would create a feoffment to take effect *in futuro*, the recording of the deed operating in the same manner as livery of seisin at the grantor's death. (Barrows, J., in *Abbott* v. *Holway*, Sup. Jud. Ct. Maine, June, 1881.)]

MERRYWEATHER v. NIXAN.

(S. L. C. Vol. II. p. 479.)
(8 T. R. 186.)

Decided: That if A recover *in tort* against two defendants and levy the whole damage on one, that one cannot recover a moiety against the other for his contribution; though it is otherwise in assumpsit.

Notes. — This decision seems to be only a modification of the maxim, "*Ex turpi causa non oritur actio*," and the whole decision may be shortly expressed by saying that as between defendants *ex contractu* the law allows contribution, but not between defendants *ex delicto*.

Where a person instructs another to do an act manifestly illegal in itself and that other does it, he has no right to be indemnified by the person so instructing him, although he had undertaken to indemnify him from the consequences; but it is otherwise if the act is not manifestly illegal and he did not know it to be so. (Indermaur's "Principles of the Common Law," Am. ed. pp. 290, 386.)

[A bridge, maintained by two counties, broke down and severely injured the plaintiff. It had recently been examined and repaired by the proper authorities, and was supposed to be safe. One county brought an action against the other to compel it to contribute its proportion of the judgment recovered against the plaintiff in an action against it for damages; and it recovered. The Court says: "Contribution is fixed upon general principles of justice, and does not spring from contract." (*Armstrong* v. *Clarion*, 66 Penn. St. 218.)

Where a field-driver was obliged to pay damages for selling cattle under irregular proceedings, he was allowed to recover by way of contribution, against him who instituted the proceedings and caused the officer to act. (*Jacobs* v. *Pollard*, 10 Cush. 287.)

"It is only when a person knows or must be presumed to know that his act was unlawful, that the law will refuse to aid him in seeking an indemnity for contribution."]

VICARS v. WILCOCKS.

(S. L. C. Vol. II. p. 484.)
(8 East 1.)

In this case it appeared that the plaintiff had been retained by J. O. as a journeyman, and that the defendant had, in discourses with third persons, imputed to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard, and that in consequence of such imputation the said J. O. had discharged plaintiff from his service, and he had thus been much injured.

Decided: That damage, to be actionable, must not be too remote; and that where special damage is necessary to sustain an action for slander, it is *not* sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander.

LUMLEY v. GYE.

(22 L. J. (N. S.) Q. B. 463.)

This was an action by the manager of one theatre against the manager of another for damages for indu-

cing a singer to break her engagement with him, and the doctrine in *Vicars* v. *Wilcocks*, as above, was urged to frustrate the action — the damage of course resulting from a wrongful act.

Decided: That the action could be maintained.

HADLEY v. BAXENDALE.

(9 Ex. 341.)

This was an action of assumpsit brought against the defendants as carriers. The plaintiffs, the owners of a mill, finding one of the shafts broken, sent to defendants' office a servant, who informed the clerk there, that the mill was stopped, and that the shaft must be sent at once, and the clerk informing him that if sent any day before twelve o'clock it would be delivered the following day, the shaft was sent and the carriage paid. The neglect arose in the non-delivery in sufficient time, whereby the making of a new shaft was delayed several days. Evidence was given of the loss of profits caused by the stoppage of the mill, which was objected to by the defendants as being too remote. *Decided:* That the loss of the profits could not be taken into account in estimating the damages; and that the damages in respect of breach of contract should be such as might fairly and reasonably be considered either arising naturally, or such as might reasonably have been supposed to have been in the contemplation of both parties at

the time they made the contract as the probable result of the breach of it.

Notes on these three Cases. — These cases embrace the question of the proper measure of damages in actions of tort, and of contract, and the subject being of very great importance a few observations on it may be found useful.

Firstly. *In actions of contract.* The rule in assessing damages here is much more strictly confined than in actions of tort, and generally the primary and immediate result of the breach of contract only can be looked to, thus, in the case of non-payment of money, no matter what amount of inconvenience is sustained by the plaintiff, the measure of damages is the interest of the money only. The principle seems to be in these cases that in matters of contract the damages to which a party is liable for its breach ought to be in proportion to the benefit he is to receive from its performance. Mr. Mayne in his "Treatise on Damages," 3d ed. (p. 9), says: "It is obviously unfair that either party should be paid for carrying out his bargain on one estimate of its value, and forced to pay for failing in it on quite a different estimate. This would be making him an insurer of the other party's profits without any premium for undertaking the risk."

Now, as to the grounds of damage which will in no case be admissible, they may be classed under the general head of remoteness. "Damage," says Mr. Mayne (p. 39), "is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it." And it is here that the case of *Hadley* v. *Baxendale* (which is one intended to settle the law upon the subject, and which has since been acted upon) comes in, laying down the rule as given above in that case, and which rule was shortly stated by Blackburn, J., in *Cory* v. *Thames Iron Works Co.* (L. R. 3 Q. B. 186), thus: "The damages are to be what would be the natural consequences of a breach under circumstances which both parties were aware of." If the damages are not within this rule, then they are too remote and cannot be admitted. There is, however, no doubt very often considerable difficulty in determining whether, when there are any special circumstances in a case, such special circumstances can or cannot be taken into account in arriving at the amount of the damages. The correct rule appears to be that where there are any special circumstances connected with a contract which may

cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage, and that if the person has an option to refuse to enter into the contract but still enters into it, this will be evidence that he accepted the additional risk in case of breach. (Mayne on Damages, 8–34.)

Secondly. *In actions of tort.* The rule here as to damages is of a very much looser character than in actions of contract, and it naturally is so from the nature of the action. With the one exception of actions for breach of promise of marriage, the motives or conduct of a party breaking a contract, or any injurious circumstance not flowing from the breach itself cannot be considered as damages where the action is on the contract, but torts may be mingled with ingredients which will increase the damages to any extent, for a trespass may be attended with circumstances of insult; or, generally, in an action of tort any species of aggravation will give ground for additional damages, and it is in such cases as this that the rule can go no further than to point out what evidence may be admitted, and what grounds of complaint may be allowed for, and the rest must be left to the jury.

Again, however, in considering the grounds of damage which will be admitted here, we must remember that it must not be too remote, and on this point the case of *Vicars* v. *Wilcocks* may be given. That case, however, goes particularly to lay down the rule that the wrongful act of some third party, induced by defendant, can never be taken into consideration in assessing the damage against defendant, for the damage must be not only the natural but also the legal consequence. This doctrine, manifestly unjust, after having been shaken by various authorities, seems to be now finally overruled by the above case of *Lumley* v. *Gye*, the effect of which is to alter the rule in *Vicars* v. *Wilcocks*, by allowing that the wrongful act of the third party may form part of the damage where such wrongful act might be naturally contemplated as likely to spring from the defendant's conduct.

As to the time to which any damages, whether in contract or tort, may be assessed, of course no damages can be given on account of any thing before the cause of action arose, and as to damages subsequent to the cause of action, the result of the decisions is stated by Mr. Mayne (p. 84) to be, that such damages "may be taken into consideration where they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action."

For further information on the subject of Damages the student is referred to Mr. Mayne's "Treatise on Damages," from which work the above notes are mainly gathered. (See also hereon Indermaur's "Principles of the Common Law," Am. ed., Part III. Ch. 1.)

[The party inducing the act and the injury sustained by it must bear one to the other the relation of cause to effect. The injury must be the proximate result of the act complained of.

In actions brought for breaches of contracts, profits which might have grown out of *them* are proper items of damages to be recovered; but profits which might come to one from contracts entered into, but collateral to those between the parties, are too remote and speculative as an item of damage. (*Fox* v. *Harding*, 7 Cush. 516.)

The plaintiff had sold a lot of wool, if it could be delivered immediately, and agreed with a common carrier that the latter should forward it to the purchaser by first freight train the next day. The carrier failed to perform his agreement, and the sale was lost. In an action for damages by the loss of the sale, the plaintiff recovered judgment against the carrier. It was held that the jury might have found that the contract between the parties to the suit was made for the purpose of completing the sale. (*Deming* v. *Grand Trunk R.R. Co.*, 48 N.H. 455.)]

NEPEAN v. DOE.

(S. L. C. Vol. II. p. 495.)
(2 M. & W. 894.)

Decided: That where a person goes abroad and is not heard of for seven years the law presumes the fact that such person is dead, but *not* that he died at the beginning or the end of any particular period during those seven years.

Notes. — Of course, this presumption of law is liable to be rebutted, and though there is no presumption of law as to the period of death, such a presumption may arise from particular circumstances; but this is matter of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential. There is also no presumption of law in favor of the continuance of life, though an inference of fact may legitimately be drawn that a person alive and in health on a certain day was alive a short time afterwards (*In re Phené*, L. R. 5 Ch. 139; see also *Hickman* v. *Upsall* (App.) 46 L. J. Ch. 245; L. R. 2 Ch. D. 617).

[Evidence that one who had not been heard from for a period of seven years had died at a precise time, must be sufficient to satisfy a jury that death occurred at that time in addition to the presumption of it by the lapse of seven years. (*Spencer* v. *Roper*, 13 *Ired.* 333.)

The presumption of death will not preclude the party supposed to be dead from asserting his rights upon his re-appearance. (*Rosenthal* v. *Mayhugh*, 33 Ohio St. 155.)]

DUCHESS OF KINGSTON'S CASE.

(S. L. C. Vol. II. p. 605.)
(Bul. N. P. 244.)

In this case there were two questions submitted to the judges: (1) Is the sentence of a spiritual court against a marriage, in a suit for jactitation of marriage, conclusive, so as to stop the counsel for the Crown from proving the said marriage in an indictment for Polygamy? (2) Admitting such sentence to be conclusive upon such indictment, may the counsel for the Crown be admitted to avoid the effect of the sentence by proving the same to have been obtained by fraud or collusion? *Decided:* (1) That the sentence was *not* so conclusive. And (2) That even admitting that it were, yet it might be avoided by showing fraud or collusion.

Notes. — This case embraces the doctrine of *estoppel*, the definition of which Lord Coke gives thus: "An estoppel is where a man is concluded by his own act or acceptance to say the truth;" but more plainly, it is "an admission, or something treated by the law as equal to an admission, of such a high and conclusive character that the party whom it affects is not permitted to answer or offer evidence against it." Estoppel is of three kinds: (1) By matter of record; (2) By deed; and (3) *In pais*, which latter means, matter of fact.

The doctrine of estoppel does not prevent a deed from being impeachable for fraud or illegality. (See *Collins* v. *Blantern*, *ante*, p. 36.)

[In a late case upon the question of estoppel, arising in an action upon a policy of life insurance, the following language is used by the

Court: "Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture." (*Ins. Co.* v. *Eggleston*, 96 U.S. 577.)]

HOCHSTER v. DE LA TOUR.

(2 Ell. & Bl. 678.)

Here there was an agreement to employ the plaintiff as a courier from a day *subsequent* to the date of the writ, and before the time for the commencement of the employment defendant had refused to perform the agreement, and had discharged the plaintiff from performing it; whereupon he had brought this action. *Decided:* That a party to an agreement may, before the time for executing it, break the agreement, either by disabling himself from fulfilling it or by renouncing the contract, and that an action will lie for such breach before the time for fulfilment of the agreement.

FROST v. KNIGHT.

(L. R. 7 Ex. 111.)

In this case the defendant had promised to marry the plaintiff on the death of his father; and he had afterwards, during his father's life, announced his absolute determination never to fulfil his promise.

Decided (on the authority of *Hochster* v. *De la Tour*): that the plaintiff might at once regard the contract as

broken, in all its obligations and consequences, and sue thereon.

Notes on these two Cases. — The principle decided in *Hochster* v. *De la Tour* seems to be one of reason, for when a man is bound to do some act at a future day, and before that day he declares he shall not do it, and refuses to do it, there seems no reason why the cause of action should be delayed until the arrival of that future day. This principle has been recognized and acted on in the case of *Frost* v. *Knight*, given above, overruling the decision of the Court below, which will be found reported in Law Rep. 5 Ex. 322.

[But the expression of an intention to break a contract will not amount to a breach of it: there must be an *express renunciation* of it. An absolute refusal makes the breach perfect. The contract is broken at that moment, and an action may be then brought upon it. (*Lamoreaux* v. *Rolfe*, 36 N.H. 35.) In that case the defendant agreed to draw a quantity of timber, and before doing any thing absolutely refused to perform the contract.

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